

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Thursday, January 13, 2005

Conference Rooms A and B
601 New Jersey Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice at 10:00 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and
General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

MICHAEL W. KLASS, Economist

ALAN J. MEESE, Senior Advisor

HIRAM ANDREWS, Law Clerk

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1 P R O C E E D I N G S

2 MS. GARZA: I'd like to open today's
3 meeting of the Antitrust Modernization Commission.

4 Firstly, I'd like to welcome the
5 Commissioners, staff, and members of the public who
6 have come to observe the Commission's deliberations
7 today, including any members of the Senate and
8 House staffs that might be here.

9 I'd also like to introduce Bobby
10 Burchfield, who is on my left at the end of the
11 table. He is the newest member of the Antitrust
12 Modernization Commission, replacing Debbie Majoras,
13 who, of course, is now the chair of the FTC.

14 And Andrew has just reminded me that I
15 ought to note for the record that we do have a
16 quorum. In fact, all of our Commissioners are here
17 today, which is gratifying.

18 The purpose of the meeting today is for
19 the Commission to determine issues for further
20 study by the Commission consistent with its
21 statutory mandate, to examine whether the need
22 exists to modernize the antitrust laws, and to

1 identify and study related issues. To assist in
2 our deliberations, the Commission staff, working
3 with several working groups of Commissioners,
4 undertook to collect and organize issues proposed
5 to the Commission by the public following our
6 requests for input and suggested by Commissioners
7 themselves. Staff and members of the working
8 groups researched and analyzed the issues and,
9 having in mind the discussion of the Commissioners
10 at our last meeting, recommended to the full
11 Commission whether certain issues should be studied
12 or not.

13 Each of the Commissioners has had an
14 opportunity to review and consider the memoranda
15 of the working groups, and we hope today to have a
16 discussion of those recommendations, leading, I
17 hope, to a consensus on at least some issues on
18 which the staff and Commissioners can begin to
19 work.

20 I'd like to note that because the purpose
21 of this meeting today is for the Commission to
22 deliberate on what issues it will study, there will

1 not be an opportunity for participation by the
2 audience. We, of course, are pleased by the
3 interest in the Commission's work that's
4 demonstrated by the people who are here today, and
5 we have appreciated the thoughtful comments we have
6 received from the public to date. There will be,
7 of course, opportunity for the public to further
8 comment on our proceedings, and we welcome anyone
9 who has any reaction to today's meeting to submit
10 any comments they would like in writing.

11 I also want to note before we begin that
12 whatever slated issues the Commission decides on
13 today should not be taken as being preclusive. We
14 will remain flexible and open throughout our
15 process. It may be that time and circumstances
16 will suggest issues to us later that we have not
17 considered or cause us to re-evaluate the study of
18 certain issues not selected today. It may be that
19 representatives of Congress or the Executive Branch
20 request us to assist them in considering certain
21 issues, and the Commission will be prepared to do
22 that.

1 The way we'll proceed today is according
2 to the agenda, which I think the Commissioners have
3 and which I think the public should have as well.
4 We have an order of the working group
5 recommendations that we're going to address; and
6 the working group leaders in each case I will turn
7 to you and ask you to begin to lead the discussion.

8 We are going to try to keep to the time
9 limits set in the agenda so that we can achieve
10 everything that we want to achieve today. And
11 Andrew will help us to meet that goal. At such
12 point as when we come to having Commissioner
13 comments, if you would like to be recognized to
14 make a comment, can I ask that you just push
15 your name plate forward or something. Oh. They
16 don't stand very well. I guess you can. You have
17 to be careful. Hopefully it won't get too noisy,
18 but if you can stand it up, then I'll know to
19 recognize you.

20 All right. Any questions before I turn
21 it over to our first working group?

22 Okay. Then we'll begin with the

1 International Working Group recommendations, and,
2 Makan, will you do the honors?

3 II. INTERNATIONAL WORKING GROUP RECOMMENDATIONS

4 MR. DELRAHIM: Thanks, Deb, Madam
5 Chairman.

6 The International Working Group
7 considered the various issues, like each of the
8 other working groups, that were suggested by the
9 Commissioners, the public, members of Congress, and
10 other comments we had gotten from the outreach
11 efforts. We considered each of the issues through
12 several conference calls of the working group and
13 evaluated and put together a memorandum for the
14 whole commission on what issues to consider and
15 what issues that the working group recommends not
16 to consider.

17 I will briefly go through and mention
18 those issues that were identified by the different
19 Commissioners. I should say at the out set that
20 not all of the recommendations were unanimous.
21 There was a lot of debate, and some of them were
22 close calls, to study or not to study, and I'll

1 identify those.

2 The first issue is whether or not the
3 Foreign Trade Antitrust Improvements Act should be
4 amended to clarify circumstances in which the
5 Sherman Act applies to extraterritorial and
6 anticompetitive conduct. This has been highlighted
7 by the Supreme Court's recent decision in Empagran
8 which continues to live on and is currently pending
9 at the D.C. Circuit. There have been other cases.
10 Several courts of appeals have identified the
11 legislation which was passed in 1982 as
12 inelegant--and I quote that, inelegant--and a
13 number of commentators had recommended--and I
14 believe within our working group, this was probably
15 the issue that was most suggested for the
16 Commission to study.

17 This was a unanimous view, that we should
18 examine what should be the reach, the
19 jurisdictional reach, of the Sherman Act and look
20 at the issues, not only of the FTAIA, but also some
21 commentators had mentioned what has been known as
22 Footnote 159, and that is anticompetitive conduct

1 abroad which affects competition in export
2 commerce, and I think the way the working group
3 recommendation is stated is broad enough to
4 encompass the study of those.

5 The second issue is whether or not the
6 antitrust exemptions for exporters in the
7 Webb-Pomerene Act and the Export Trading Company
8 Act should be eliminated, and the recommendation
9 for the Commission to study that was unanimous in
10 the working group, and we do recommend that it be
11 studied whether it makes sense currently.

12 The third issue recommended to be studied
13 are whether or not there are technical or
14 procedural changes that the United States could
15 implement to facilitate further coordination with
16 foreign antitrust enforcement authorities. This
17 one bears a little bit of discussion. There was a
18 lot of discussion in the working group on this
19 issue, and it is whether or not there are not only
20 efforts, but a number of efforts that the
21 Department of Justice and Federal Trade Commission
22 undertake in order to see convergence of procedural

1 and substantive standards to the extent possible
2 with our foreign antitrust bodies. Those efforts
3 and relationships have been praised by the ABA
4 Antitrust Section. Numerous commentators think
5 it's a reality that there are a hundred antitrust
6 authorities now that have some jurisdiction over
7 global mergers or just conduct by any company in
8 this new economy, and whether or not the Justice
9 Department and FTC's efforts currently can be
10 improved is an issue to be studied by the
11 Commission, and the working group, a majority of
12 the working group, did recommend that the
13 Commission did study that.

14 There are some statutory impediments, as
15 well, to some of the international cooperation
16 efforts. For example, the International Antitrust
17 Enforcement Assistance Act that was passed in 1994
18 has a provision dealing with the use of information
19 that is disclosed as part of the agreement between
20 the different antitrust authorities, and that has
21 been identified as an impediment to obtaining
22 agreement between the United States and some of its

1 foreign trading partners, Canada and the E.C. to
2 name two, and perhaps the Commission could
3 recommend modifications to that law.

4 The next issue which did require a lot of
5 debate which was recommended by the working group
6 majority to be studied, and since it has been
7 identified, the Commission has gotten further
8 public comment, is whether or not the antitrust
9 laws need to be re-evaluated.

10 MS. GARZA: Antidumping?

11 MR. DELRAHIM: Antidumping laws--I'm
12 sorry --should be re-evaluated. I guess our
13 current mission is to re-evaluate the antitrust
14 laws. And that has been motivated by a lot of
15 commentary on whether or not there needs to
16 be--whether or not the antidumping laws currently
17 do not promote free competition in and of
18 themselves and whether the standards similar to
19 the--whether the recoupment standard like in Brown
20 and Williamson should be adopted within the
21 antidumping laws. Again, this was a close call of
22 whether or not the Commission had jurisdiction to

1 look into this and whether it should, and currently
2 the working group recommendation is to do that.

3 The three issues that are recommended
4 that the Commission not take up are whether the
5 U.S. should support a creation of an international
6 antitrust regime or body. For the past decade or
7 so, the WTO has had a competition working group,
8 trade and competition working group. This has been
9 an issue that has been studied and is a live issue.
10 Whether competition will be at some point a chapter
11 in the WTO agreement, I think remains to be seen
12 and will continue to be a live issue, but there are
13 some concerns about that. Partly, it's the
14 capacity of some of the newer antitrust enforcement
15 authorities and whether or not they--requiring all
16 the WTO signatories to enact antitrust laws is a
17 good idea at this time and whether at some point if
18 there is a trade dispute, a three-panel decision of
19 the WTO should be imposing the proper standards for
20 U.S. antitrust authorities or other developed
21 countries' antitrust authorities to be following.

22 Currently, a lot of antitrust enforcement

1 by the agencies is animated by discretion,
2 prosecutorial discretion; for example, in the
3 Robinson-Patman Act, the number of cases that have
4 been brought in the last four years is indicative
5 of that discretion as it is exercised, as well as a
6 criminal case for some conduct, and if those are
7 the laws, would we be in violation if we didn't
8 bring a case like that if we were subject to a WTO
9 review.

10 The next issue is whether or not private
11 parties should be able to obtain discovery in the
12 United States when they have a matter in foreign
13 tribunals. This is an issue largely decided
14 recently by the Intel v. AMD case of the Supreme
15 Court, and there hasn't been a consensus that this
16 is a real problem at this stage, and the working
17 group recommends that the Commission not study
18 that.

19 And the last issue is yet another issue
20 that continues to attract a lot of debate both in
21 Congress and some academics in whether or not the
22 antitrust laws should be changed or other doctrines

1 should be changed to permit claims in U.S. courts
2 against OPEC, and the working group recommended
3 against the Commission taking up that issue.

4 That is my report, Madam Chair.

5 MS. GARZA: All right. I think what we
6 had wanted to do at this point was, initially
7 before discussion, to run through the issues
8 quickly by a show of hands, determine where the
9 Commissioners were, and whether they agree with the
10 recommendations of the working group. Before I do
11 that, does any Commissioner have a question for
12 Makan about any of the specific recommendations?

13 Mr. Shenefield.

14 MR. SHENEFIELD: I was a member of the
15 working group. I would simply like to say, and
16 Makan may not be aware of this, that personally I
17 would recede on Issue No. 4, the antidumping issue,
18 and not at this point support studying that. So I
19 don't know whether you were aware of that, but that
20 is now a fact.

21 MS. GARZA: Okay. Don Kempf.

22 MR. KEMPF: Yes. I'll comment on that in

1 due course, but for now, I just have a question.

2 MS. GARZA: All right.

3 MR. KEMPF: It is Issue No. 5, creation
4 of international antitrust regime and body. Many,
5 many people have suggested we take a look at the
6 interface between the U.S. and foreign antitrust
7 law, some substantive, some procedural, without
8 suggesting that we go so far as having like a world
9 court of antitrust, and I'm wondering what, if
10 anything, your working group is or is not
11 recommending with respect to harmonization, for
12 example, at least on a procedural side, for
13 example, in the forms required for pre-merger
14 clearance.

15 MS. GARZA: Before you answer that,
16 Makan, because I had a similar question, I was
17 wondering whether Item 3 was sufficiently broad in
18 the minds of the working group to cover the kinds
19 of issues that Don had identified, particularly on
20 the issue of convergence on the sort of procedural.

21 MR. DELRAHIM: That's a good point. I
22 believe, at least in my mind, No. 3 is intended--in

1 fact, to include multi-jurisdictional mergers, cross-border
2 mergers, and that issue was recommended by numerous
3 parties for us to study. No. 3 is intended to
4 include that, and as part of this study, we would
5 be looking at the cooperation agreements with
6 respect to mergers as well as cartel investigations
7 and the filing, but if we need to make that any
8 clearer, at least we have it on the record now that
9 No. 3 should include review of mergers.

10 MS. GARZA: Do you have a question?

11 MS. VALENTINE: I guess I need a little
12 clarification on that. I was on the working group,
13 and we discussed whether it should be broad or
14 narrow, and because there are so many groups
15 working on these convergence harmonization issues,
16 whether it be the agencies themselves, the ICN, the
17 OECD, the trade and competition group at the WTO,
18 we specifically narrowed Section 3 to two specific
19 technical issues, thinking that we could actually
20 make positive contributions there and that we would
21 devote a lot of time and perhaps not make much
22 contribution in a much broader vaguer area.

1 I'm not saying I'm unwilling to
2 look at some broader set of issues, but I do think
3 that we are going to fall into a morass of
4 cross-border work without a clear focus if we don't
5 address this a bit more than was just glanced at.

6 MR. YAROWSKY: Well, as so often happens,
7 there is some overlap, and I think in the merger
8 working group, some of the same issues have arisen.
9 We'll get to that shortly. I would ask for folks
10 to think about what Makan sketched as appropriate
11 in some context, particularly at least in the
12 merger context, because I know that there will be
13 probably some congressional hearings, not that we
14 necessarily will participate, but I think there is
15 some hope that the Commission might be able to
16 contribute some thoughts to it in a near-term time
17 frame, whereas some of the other bodies considering
18 this, that may not be possible in the near term .

19 But I do hear what you're saying about
20 your internal deliberations.

21 MS. VALENTINE: Well, I just would like
22 this phrased more specifically.

1 MR. YAROWSKY: Yeah. I understand.

2 MS. VALENTINE: What is it that
3 specifically we're going to study? We have 500
4 issues here, and I have no problem looking at
5 procedural convergence, perhaps, but if we start
6 talking about substantive convergence, we're going
7 to be talking until the next century.

8 MS. GARZA: Right. I think we were
9 talking about procedural convergence. For the
10 purpose of voting, if you will, we can either take
11 three with the narrow definition that's presented
12 in the working group memo and address the issue
13 that's been raised about convergence of processes
14 to the merger area, if people feel it's primarily
15 relating to the merger area, although there may be
16 Section 2 monopolization-type investigations as
17 well. That would merit some kind of
18 additional steps being taken to ensure comity and
19 lack of conflict.

20 So I guess the question I have is for the
21 purposes of polling the Commissioners is what we're
22 talking about with three.

1 Sandy?

2 MR. LITVACK: Yeah. I would agree with
3 Debra. I would like to see, for voting purposes at
4 this point, it narrowed as specified in the agenda
5 and then consider separately the additional
6 questions to the extent to which and if so with
7 respect to what should be expanded.

8 MS. GARZA: All right.

9 MS. VALENTINE: Thank you.

10 MR. JACOBSON: Madam Chair.

11 MS. GARZA: I'm sorry. Jon.

12 MR. JACOBSON: The working group
13 recommendation--I'm endorsing what Debra
14 said--really was much narrower than we've been
15 talking about. If the decision now is to defer the
16 discussion of substantive and procedural aspects of
17 merger review coordination to the merger group
18 discussion, I'm in favor of that.

19 I want to say this is a hugely important
20 issue. The fact that it's a hugely important issue
21 does not mean it's an issue that is appropriate
22 for this Commission to review. We do have 25 to 30

1 issues, and this has been the subject of analysis
2 by agencies at the Federal level, prior
3 commissions, ICPAC, and a number of other bodies,
4 and could easily become a full-time exercise for
5 this group and swamp everything else we do.

6 So I'll be interested in hearing further
7 discussion on it , but I am wary of getting into
8 these issues.

9 MS. GARZA: Okay. Anyone else?

10 Based on that, then, I think what we'll
11 do is--oh. Don.

12 MR. KEMPF: I seem to recall--I don't
13 have the transcript with me--but there were three
14 or four things that the Chairman Sensenbrenner, who
15 was one of the driving forces in establishing this
16 Commission, spoke to us about at our first
17 gathering, and it's my recollection that the
18 international disconnect of the antitrust field was one
19 of them that he thought, at least as one of the architects
20 of this Commission, perhaps the primary architect,
21 that was important, and I'm influenced by that.

22 So the reason for my initial question was

1 I feel the strong need for harmonization in
2 technical form fillings and things like that, which
3 I now, with clarification, understand is
4 contemplated, but I don't want to foreclose looking
5 at the subject of convergence.

6 From a personal standpoint, my current
7 inclination is that our country does not want to
8 converge toward European thinking in antitrust
9 enforcement generally or in the merger area in
10 particular, but it is a matter of great concern,
11 not only to Congress, but much of industry, which
12 has been subject to a number of rulings in the
13 merger area. Three of the past four major rulings
14 have all been overturned subsequently in Europe,
15 and I certainly don't want to foreclose us looking
16 at that. It's one of the most important things in
17 the antitrust field right now.

18 MS. GARZA: For the purpose of just going
19 through this, and I think just to be clear, I think
20 what Debra had indicated was that her sense that
21 Item 3, the recommendation itself, does not
22 necessarily include, Don, the issues you've been

1 raising, but I also sense that there are
2 Commissioners who would like to discuss that as an
3 issue. Whether it's in the context of this working
4 group or the merger working group really isn't all
5 that relevant.

6 For the purposes of trying to see where
7 we are in these recommendations, can I get an
8 agreement from everybody that we will, by a show of
9 hands, vote on three in its narrow construction so
10 that we will know, just going through these issues,
11 that the issues Don raised and others have raised
12 will be addressed as a separate issue?

13 MS. VALENTINE: Fine.

14 MS. GARZA: That having been said, by a
15 show of hands, can Commissioners indicate whether
16 they agreed with the recommendations of the working
17 group on Issue 1?

18 [Commissioners vote by show of hands.]

19 MS. GARZA: All right. There appears to
20 be complete agreement on that. Can I get a show of
21 hands in respect to the Commissioners agreement
22 with the recommendation of Issue No. 2?

1 [Commissioners vote by show of hands.]

2 MS. GARZA: Okay. Sandy, we'll note
3 that. We'll come back.

4 Can I get a show of hands in respect to
5 Issue No. 3 then, that you support the
6 recommendation?

7 MR. KEMPF: So it's clear--

8 MS. GARZA: Narrowly, yes.

9 MR. KEMPF: That does not mean that I don't--

10 MS. GARZA: Exactly, yes.

11 [Commissioners vote by show of hands.]

12 MS. GARZA: Okay. Can I also get a show of
13 hands on Issue No. 4?

14 [Commissioners vote by show of hands.]

15 MR. KEMPF: I want to comment on that.

16 MS. GARZA: Okay.

17 MR. KEMPF: A number of--two Commissioners have
18 at least expressly said that they've changed their position
19 on that. I think the record should reflect that we've
20 received a large number of letters or whatever number it is.
21 It's certainly much more than we received on any
22 other issue, and while the letters come from

1 disparate sources, many on Capitol Hill, many from
2 special interest groups, they strike me as what
3 I'll call Manchurian Candidate letters.

4 As you may recall from the film, when the
5 character who was the bad guy, the whole--I'm
6 talking about the original Frank Sinatra movie, not
7 the more recent one with Denzel Washington. This
8 group had been captured in North Korea and
9 brainwashed by the Chinese communists, and their
10 platoon leader, Raymond something or other, when
11 anybody ever asked his name, they would all say
12 "Raymond was the finest, most wonderful human being
13 I have ever met and a great American," and these
14 have that ring to it. They may come from multiple
15 points, but they look to be all by the same fine
16 Italian hand, and if you read them, many of the
17 phrases are precisely identical.

18 So I put less stock in the content of the
19 letter, which I view as one letter, not many, than
20 I do in the fact that many people agreed to send us
21 a letter, and that is no small accomplishment and
22 it is not something we should view lightly. The

1 letters raise several points. One is that this is
2 outside our mandate, something that did not occur
3 to a single one of the twelve Commissioners
4 previously. Second, they say that it's beyond our
5 area of expertise. They have other criticisms as
6 well, some being that things are hunky dory as they
7 are and we shouldn't meddle with them.

8 In any event, I have read them with care,
9 and in the aggregate, I am persuaded that we should
10 drop this, but I just wanted to have the record
11 clear what the background for this shift by the
12 Commission is.

13 MS. GARZA: Just to be clear--let me
14 clarify that--I think that, as Makan had indicated,
15 there was actually extensive debate within the
16 working group before recommending this, and it
17 wasn't--not all members of the working group agreed
18 with the recommendation. If you look at the
19 comments in the memo, they were for the very
20 reasons that I think are addressed or some of the
21 very reasons addressed in the input that we've
22 gotten from folks on the Hill.

1 There was a serious question, in fact, as
2 to whether or not anybody had anticipated in
3 creating us that we would look at--that looking at
4 the antidumping laws as opposed to looking at the
5 antitrust laws was actually something that we were
6 intended to cover. So it's not really a completely
7 accurate thing to say that none of the 12
8 Commissioners considered it. We did, and it wasn't
9 clear whether or not it was in our jurisdiction. I
10 think that we've gotten an indication now that at
11 least some members of the Hill did not view this
12 within our jurisdiction, and there are other issues
13 as well relating to our expertise and the political
14 sensitivities, and various other things.

15 So just to be clear, I think that my
16 position, for example, from the beginning was not
17 to recommend it. I haven't changed my position as
18 a result of the letters, but I think the letters
19 reflect some of the concerns that I have.

20 Debra.

21 MS. VALENTINE: And if I could make a
22 comment for the record as well, please, I was one

1 of the people who voted for considering this in
2 contrast to what the letters say, which there the
3 claim is that the dumping laws and the antitrust
4 laws have are very distinct. In fact, price
5 discrimination issues in the Robinson-Patman Act
6 are very similar to price discrimination issues in
7 the dumping acts. The letters also claim that any
8 study of the issue by this Commission would
9 undermine the work of the WTO trade and competition
10 policy group addressing this issue.

11 I actually think we might offer some
12 helpful advice and perhaps enlightenment, and while
13 I do respect the views of Congress that this issue
14 is perhaps not at the core of what people wanted us
15 to do, and I will defer to those views, I think it
16 is somewhat unfortunate that people simply do not
17 even want to hear a perspective that might
18 represent the interests of consumers, who are
19 admittedly a more dispersed voice in our community,
20 that might be set--help to set in a more fair and
21 accurate context the views of certain producers who
22 do tend to be quite concentrated and vocal.

1 So I regret not having the opportunity to be
2 able to enlighten the public in this area, but I will
3 defer to the members of Congress who have asked that we
4 not study the issue.

5 MR. SHENEFIELD: May I make a statement
6 for the record?

7 MS. GARZA: Yes.

8 MR. SHENEFIELD: As long as we're
9 creating records here, and it will be very brief,
10 the antidumping laws are enforced in a profoundly
11 anticompetitive and anti-consumer way. Somebody
12 should take a look at it. It's not one of the top
13 25 items on this commission's agenda in my
14 judgment, and that's why I've changed my mind.

15 MS. GARZA: That's fair. Anyone else?
16 Dennis.

17 MR. CARLTON: I wasn't on this
18 subcommittee, but it seems clear that one of the
19 motivations was that the antidumping laws are a set
20 of laws that often harm consumers. There may be
21 greater strategic international interests which
22 some of the letters raise, and it may be beyond

1 what people thought we should study. I think the
2 main point is the subgroup thought it was an
3 important issue to study, primarily because they
4 were worried that consumers in the United States
5 are being harmed, and I too obviously will to defer
6 to what members of Congress think, but I think it
7 should be taken from this discussion, and I suspect
8 all the Commissioners would agree, but they can
9 speak for themselves, that this is an issue that
10 someone should study carefully to make sure that
11 consumers aren't being harmed.

12 MS. GARZA: Okay. Great.

13 All right. And, Sandy, I wanted to come
14 back to you and ask you whether there was anything
15 you wanted to say on Issue No. 2.

16 MR. LITVACK: Yes. My negative
17 indication really is based on the factor which will
18 come up as we go along, and it's prioritization.
19 One of the problems with voting as you know go is
20 that you can vote yes to everything, and then at
21 the end, you up and say we just have a slate
22 that's unmanageable.

1 With that in mind, it seems to me this is
2 issue is among the less important or less pressing
3 issues. It has limited effect, as has been noted,
4 on U.S. consumers. It really is directed toward a
5 different issue, and again, if we had infinite time
6 and infinite resources, I probably would feel
7 differently about it, but given that we don't and
8 given the fact that I am trying to discipline
9 myself as I vote, this is one I would not do.

10 MS. GARZA: Okay. Go ahead.

11 MR. YAROWSKY: And, Sandy, I understand
12 this is a distinct point for this working group.
13 It will come up again when we talk later about the
14 immunities and exemptions as part of a much larger
15 group, and it may be that just from an efficiency
16 time point of view, we may deal with those. We
17 don't know how we're going to deal with
18 those--we'll all have to decide that --but in a
19 larger group way so that we can allocate
20 appropriate amount of time and not undue time.

21 And the last thing I would say, I know
22 we've talked a lot about the antidumping laws, I

1 certainly value the views of Congress and what
2 everyone has said here about the need to maybe
3 review these statutes. I certainly do not have
4 expertise in them. So when those letters came in,
5 they were really talking to me. I would certainly
6 like to be diligent to study another area, but
7 unlike Debra, you may have some real background. I
8 don't. It doesn't mean I can't become enlightened.
9 I do think overall that the decision that we've all
10 made is the right one.

11 MS. GARZA: In the interest of time, let
12 me ask with respect to the issues not recommended
13 for study whether any Commissioner would like to
14 discuss promoting any of those--aside from the
15 issue, discussion we had on Issue No. 5, whether
16 any Commissioner wanted to discuss promoting any of
17 those issues to the recommended.

18 Makan.

19 MR. DELRAHIM: I was in the minority on
20 Issue No. 5, and I do feel strongly that even
21 though it is being studied in areas what where they
22 would expand the jurisdiction, like the WTO and

1 there is a competition and trade committee, it is
2 important partly because of the fact that it is
3 still a live issue. There is a group within the
4 trade world, and if we do see divergence between
5 the U.S. regime and E.C., there will be even a
6 stronger push to have competition be in another
7 chapter. We continue to see that in the various
8 free trade agreements that the United States has
9 recently signed with Chile, Singapore, and now with
10 the Latin American efforts that are going on in the
11 Central American Free Trade Agreement.

12 So it is an issue that I think is
13 important because we're going to face it. In fact,
14 with the Mexican telecom decision of the WTO, it
15 largely centered on some side letters that dealt
16 with antitrust issues, and we're going to see this
17 and might be able to--now, in order of priority, is
18 this one of the issues we should? I think it's one
19 of the cutting edge issues that will affect our
20 practice, whether it is a larger WTO chapter like
21 intellectual property or whether it is going to be
22 an issue that is going to be raised as part of the

1 free trade agreements that we have signed and each
2 country, now that we engaged in our negotiations,
3 is requesting that competition be a chapter of that
4 free trade agreement.

5 So I think that is one that merits, if
6 not study, at least some comment here. I would be
7 interested in the knowing what the full Commission
8 thinks of the issue.

9 MS. GARZA: Jon.

10 MR. JACOBSON: I agree with everything
11 that Makan said, everything, but I vote no on the
12 issue because I think there are bodies better
13 suited than us to deal with these issues, and given
14 the magnitude of the task before us, we are better
15 off and do the American public better good by
16 punting this issue to those other bodies, one of
17 which is the Department of Justice.

18 MS. GARZA: Don.

19 MR. KEMPF: I'm not sure. I was not on
20 the committee and I don't know precisely what's
21 intended. Let me give you my views or why I think
22 it would be worth studying and not worth studying,

1 and you can tell me whether it's covered or not
2 covered by the proposal.

3 I do not think it's worth studying
4 whether we should have a body like an international
5 antitrust court. I agree with Jon that there are
6 other groups who are better suited to do that than
7 us. And I'm not sure what regime means, whether
8 that is like an international law of antitrust,
9 which again I don't think is worth investing time
10 in.

11 I am concerned about the disconnect
12 between what I'll call the efficiency and
13 competition-focused model in the United States and
14 the what I'll call protectionist model in some
15 other places, which is anti-consumer, and encouraging
16 further study of that, encouraging efforts to have
17 other jurisdictions see the wisdom of a regime that
18 has in its focus sometimes escaped us, but in the
19 main served this country well for a hundred years
20 now. And I don't know whether that is encompassed
21 or not, but that's one I am interested in. The
22 other two, I am not. I don't know whether mine

1 fits or not.

2 MS. GARZA: Any further discussion?

3 Can I have a show of hands where the
4 Commissioners stand on including this issue on our
5 initial slate of issues for study, if you agree
6 with the working group's current recommendation not
7 to study Issue No. 5?

8 [Commissioners vote by show of hands.]

9 MS. GARZA: Can I ask for the same show of hands
10 in respect to Issue No. 6, if you agree with the recom-
11 mendation of the working group not to study this issue?

12 [Commissioners vote by show of hands.]

13 MS. GARZA: Can I ask the same question
14 with respect to Issue No. 7?

15 [Commissioners vote by show of hands.]

16 MR. YAROWSKY: I'd like to comment on
17 Issue No. 7.

18 MS. GARZA: All right.

19 MR. YAROWSKY: Again, we've received
20 comment throughout the course of the creation of
21 this body. One of the, I thought, insightful
22 letters came from the Senate side came from the

1 Senate Antitrust Subcommittee chaired by Mike
2 DeWine and Ranking Member Kohl.

3 Some of their concerns in terms of the
4 oversight they do on antitrust in the
5 agencies--they hear this day in and day out --is
6 are there ways to make time lines and
7 considerations more efficient and do fairness to
8 the parties who are involved and how to study that.
9 It's a difficult task because you don't want to
10 reach into internal workings that would disturb
11 that. On the other hand, you need some element of
12 transparency so that the outside public can
13 understand what's going on.

14 One of the suggestions they have made in
15 their letter that I think is posted on our web site
16 is that the Commission look at both criminal
17 investigations to see if there is a way--

18 [Ms. Garza confers with Mr. Yarowsky.]

19 MR. YAROWSKY: Okay. Well, I guess I
20 should do what Gilda Radner used to do and say
21 never mind.

22 MS. GARZA: Just to be clear--

1 MR. YAROWSKY: We'll hold this for later,
2 because I think it's a tremendous concern.

3 MS. GARZA: To be clear, Issue 7 was
4 OPEC.

5 MR. YAROWSKY: I'm sorry. This happens
6 to be in the wrong slot.

7 MS. GARZA: Okay.

8 MR. YAROWSKY: So I withdraw.

9 MS. GARZA: Okay. Until later.
10 Did you get our vote on seven?

11 MR. HEIMERT: Yes.

12 MS. GARZA: All right. Then that for now
13 will conclude our discussion of the International
14 Working Group memorandum. Obviously, after this
15 meeting, staff will go back and--we'll talk later
16 on at the end of the meeting. This kind of gets to
17 your point, Sandy, I think. There is a risk when
18 you do it this way, that it's more difficult to
19 look at the whole thing and prioritize, and I agree
20 with you, and if you had to really face your
21 limited resources, there is some that you would cut
22 off the list, and I encourage Commissioners that

1 everybody has had an opportunity to look at all of
2 the working group memoranda, and so I think that's
3 appropriate to form your votes on the individual
4 issues, but we will also come back to that at the
5 end of the day.

6 III. CRIMINAL PROCEDURE WORKING GROUP

7 RECOMMENDATIONS

8 MS. GARZA: I'd now like to turn to the
9 discussion of the Criminal Procedure Working Group
10 recommendations, and I think that's you John, John
11 Shenefield.

12 MR. SHENEFIELD: Right. These
13 recommendations should not long detain us.

14 The affirmative recommendations for
15 consideration are two. One concerns one of the
16 most notorious pieces of antitrust trivia that
17 exists, and that is section 3 of the
18 Robinson-Patman Act, rarely enforced, barely known
19 by most practitioners. It would seem to be a
20 likely candidate for repeal, and therefore the
21 working group recommends we study that issue.

22 More complicated is the issue of

1 sentencing, particularly in light of the
2 Booker-Fanfan decisions of yesterday. The issue is
3 not essentially different in the antitrust area
4 from other criminal law areas. Nevertheless, the
5 working group's thought was that we might be able
6 to provide informative commentary as the process of
7 adjusting to the Supreme Court opinions unfolds.
8 Therefore the working group, though we haven't
9 taken any vote this morning, I sense continues to
10 recommend that we put it on the agenda, but hold
11 it, stage it, wait to see some of the dust
12 clearing, and then make a separate determination as
13 a Commission as to whether there is anything useful
14 we can contribute.

15 Issues not recommended for study are six.
16 There was a suggestion that there should be some
17 more precision given to the language of Section 1,
18 particularly, in connection with of the Sherman
19 Act. The working group's judgment, strong
20 consensus, was that existing jurisprudence plus
21 prosecutorial discretion, the exercise of
22 prosecutorial discretion, were more than adequate

1 and the problem wasn't quite as serious as some
2 might think.

3 As to Section 2, criminal enforcement,
4 again rarely, rarely pursued through criminal
5 enforcement, Section 2. Nevertheless, the working
6 group thought that it was important to retain the
7 possibility in that very rare situation where it
8 might be appropriate.

9 The question of corporations subject to
10 criminal penalty is a serious question. By and
11 large, the working group was persuaded that keeping
12 the corporation subject to criminal liability
13 encouraged the corporation to maintain an
14 atmosphere of compliance and that was
15 beneficial and in the public interest.

16 Wiretap authority, under the Omnibus
17 Crime Control Act of 1968, only Title 18 crimes are
18 subject to wiretap authority. It would certainly
19 be useful, but it's not a big deal since most or
20 many cartel cases can be pursued under mail an wire
21 fraud charges which are violations of Section 18,
22 Title 18, and so that was not recommended.

1 Can antitrust criminal investigations be
2 made efficient and shorter, that's sort of related,
3 Jonathan, to --

4 MR. YAROWSKY: Yes, exactly.

5 MR. SHENEFIELD: --the point that you
6 make. I believe they are made as efficient and
7 short as makes sense, and the agencies are more in
8 charge of that than anything else. I think it's an
9 illusion to suggest that they sort of meander
10 forever beyond controls, and so I think the working
11 group's view was this is not one of our top 25 or
12 30 issues.

13 Additional mechanisms being put in place
14 to enhance the detection of cartel activity, given
15 the passage of legislation last summer to create a
16 single damages option and therefore have further
17 incentive to participate in the leniency program,
18 the working group's view was that we should let
19 that legislation work its way out, see whether it
20 is successful, but that at this point, we did not
21 recommend that subject for further study.

22 So, Madam Chairman, we recommended two

1 issues for study, one on a kind of a slightly
2 delayed basis, and suggested that the six other
3 issues not be recommended for study.

4 MS. GARZA: Are there any questions for
5 John?

6 Don.

7 MR. KEMPF: Yes. We received a very
8 thoughtful communication from the Assistant
9 Attorney General in charge of the Antitrust
10 Division, and on your first one, you have repeal of
11 the Robinson-Patman Act, Section 3. Perhaps that's
12 because that's the criminal part of it.

13 MS. VALENTINE: Correct.

14 MR. KEMPF: And I assume you did not
15 suggest--indeed your comments suggested
16 otherwise--that it is not to be preclusive of
17 keeping the rest of the Robinson-Patman Act.

18 MR. SHENEFIELD: Correct.

19 MS. VALENTINE: It's addressed by a
20 different working group.

21 MR. KEMPF: Yeah. Second, on the final
22 one, Recommendation 8, the voluntary disclosure as

1 a means of enhancement of cartel detection, it is
2 something that is--I agree with all of your
3 comments on that, but my question is a broader one.
4 Would it be productive to--did your working group
5 look at other ways to enhance cartel detection that
6 had nothing to do with the one that you
7 specifically identified, and have you thought about
8 whether that would be something useful for us to
9 look at or not?

10 MR. SHENEFIELD: Such as what?

11 MR. KEMPF: I don't have anything in
12 mind. I wasn't--

13 MS. GARZA: I think there was one.

14 MR. SHENEFIELD: Qui tam action?

15 MS. GARZA: Exactly. I think that was
16 something that we had heard from other folks.

17 MR. KEMPF: In other words, I started off
18 with the proposition of enhancing cartel detection
19 is a most worthwhile use of resources, and I'm not
20 sure why we would not want to not look at that
21 since my view is that Section 1 is by far the most
22 important of the antitrust laws, more so than most

1 of all the rest added together, and therefore I
2 would think enhancing the detection of cartels
3 would be a hugely beneficial thing to consumers.

4 MR. SHENEFIELD: Without joining in all
5 of that, the answer, I think on behalf of the
6 working group, would be that while we all agree
7 that Section 1 in some sense is the centerpiece of
8 the antitrust laws, the detection of cartels is
9 fairly formidable as it is. The leniency program
10 has been a huge success. The qui tam action issue
11 is a highly controversial one, and by and large, I
12 think the working group's view was it was better to
13 devote our resources to other more demanding issues
14 than that on, but that's a judgment call.

15 MS. GARZA: Let me note that Jon and I
16 have heard, I think, that this is an issue of
17 potential interest, the qui tam in particular,
18 potential interest on the Hill. So even if we
19 don't agree to address it now, I hope that we'll be
20 sufficiently flexible that if we should get a
21 request for input as to the wisdom of that kind of
22 legislation, that we would look at that. Indeed,

1 it may be something that we cover when we look in
2 general at private enforcement and other contexts.

3 MR. SHENEFIELD: I don't think--I guess I
4 assumed, Madam Chairman, that in connection with
5 all of these issues not recommended for study or
6 recommended for study, there is no bar to having
7 some mid-course correction if that seems advisable.

8 MS. GARZA: Right.

9 MR. LITVACK: The only thing, if I may
10 add, on the qui tam issue, and I agree we should
11 keep an open mind on it, you do have a private
12 civil damage action remedy, and I don't know what
13 else the qui tam is really going to add, and I
14 guess as a member of the subcommittee working
15 group, I felt and feel that, as John said, this is
16 an area where we ought to let things play out a
17 little bit and see what more there is. I don't
18 know that it's worthwhile at this point trying to
19 particularly study how qui tam actions really work.

20 MS. GARZA: Jon.

21 MR. JACOBSON: I just want to make a
22 brief comment about sentencing. I agree with

1 John's point. The Booker case just came out
2 yesterday. We need to spend some time to see how
3 it's responded to. I have a particular concern,
4 though, and that is that we have today an antitrust
5 sentencing regime that has been upset, certainly,
6 by Apprendi, Blakely, and Booker, but it's one
7 that in terms of sentencing guidelines was largely
8 put in place by people who were far more familiar
9 with sentencing for narcotics cases than for
10 antitrust defenses, and there are discrete issues
11 that arise in antitrust sentencing, particularly
12 demonstrating the amount of impact, gain or loss,
13 under 3571, and I do think the Commission can make
14 a positive contribution. I do think it's a
15 contribution that is better done in terms of our
16 hearings towards the end of the process so that we
17 can see what the impact of Booker has been on the
18 current regime.

19 MS. GARZA: Jon.

20 MR. YAROWSKY: Yes. I won't have to
21 speak long. I'm just going to renew my comments of
22 a little bit ago.

1 John, if you don't mind, can I just
2 direct these maybe to you as a way of proceeding?

3 What I think I respond to is the need to
4 have some sense of timing that goes on in the
5 agencies. It may be different than to be
6 prescriptive. It may only be an abbreviated
7 look-see, so to speak, to see if the agencies have
8 internal guidelines just to keep things moving. I
9 don't really know the answers to that these days,
10 and that's really, I think, the nature of the
11 request coming from the Senate Judiciary Committee,
12 just that someone among us or some folks among us
13 would have some sense of that. So I don't want to
14 create a mega-issue for the Commission, but on the
15 other hand, I'd like to be somewhat responsive, but
16 maybe we could tailor it a bit.

17 MR. SHENEFIELD: Perhaps the solution,
18 Madam Chairman, is for a couple of us to sit down
19 with the Assistant Attorney General and the chair
20 of the Federal Trade Commission, make the
21 inquiries, bring the information back to this
22 group, and if we feel differently about the

1 recommendation in a month or two, we can come to a
2 different result.

3 MS. GARZA: All right. That sounds good.

4 MR. SHENEFIELD: As anybody knows, in the
5 criminal area, there is a kind of almost, not
6 entirely--it's not definitive limitation because of
7 the life of the grand jury, and that tends to be
8 the objective, but I know, for instance, when Mr.
9 Litvak was Assistant Attorney General, he had
10 regular meetings with his section chiefs and he had
11 a computer print out and he asked what's happening
12 with this, what's happening with that, what's
13 happening with that.

14 MR. YAROWSKY: And when we used to have
15 Mr. Litvak come up to the House Judiciary Committee
16 every year in April, he would say that in a certain
17 general way. That's why I say I've lost a sense of
18 whether that is going on.

19 MR. LITVACK: I agree with Jon that we
20 ought to try to get the answer. When the question
21 is phrased as it is here, the answer is of course.
22 Can we be more efficient? Sure. The real issue to

1 me is, A, to get the facts and then to decide
2 whether or not there is really something we can add
3 to the process.

4 MS. GARZA: Okay.

5 MR. SHENEFIELD: And maybe if you'd like
6 to--maybe Mr. Litvak and I can volunteer to have a
7 conversation with Mr. Pate on that subject.

8 MS. GARZA: I'm sure Mr. Pate will look
9 forward to talking to you.

10 MR. SHENEFIELD: I'm sure he will.

11 MR. LITVACK: Consider us volunteers.

12 MS. GARZA: Does anyone else want to make
13 any comment before we try to gauge the consensus of
14 the Commission?

15 MR. BURCHFIELD: Can I just ask--and I
16 don't disagree with this comment, but I would just
17 be interested in what John and Jonathan expect to
18 learn over the course of time about the
19 implementation of the Booker decision. I think I
20 know that, but do you have certain things in mind
21 that we are going to look for before we begin
22 analyzing that issue more precisely?

1 MR. SHENEFIELD: Well, I think the one
2 that will happen quickest is something on Capitol
3 Hill. I think there will be a fairly quick move to
4 deal with the situation in which the sentencing
5 regime now finds itself, and that's just going to
6 change the world fairly substantially and it may
7 actually come through fairly quickly. If that's
8 right, then it would be a total waste of our time
9 to kind of be spending a lot of time studying
10 something that's about to be changed pretty
11 definitively.

12 MR. JACOBSON: There is one other --if I
13 might, there is one other issue, which is the
14 Department of Justice--I think it's well known--is
15 proceeding on the basis of the guidelines, the
16 guidelines in antitrust as of yesterday, and we
17 don't know how the division is going to proceed. I
18 do think it's worth some time to let the division
19 decide how it is going to proceed in terms of
20 sentencing, at least in matters of in excess of a
21 hundred million dollars, before we start evaluating
22 what we can add to the process.

1 MS. GARZA: For what it's worth, I agree
2 as I well. I think with those decisions, it
3 doesn't make any sense to go into this now. Those
4 decisions have a very broad impact. There is
5 likely to be some action. You know, it may be that
6 we never get to this issue for a variety of
7 reasons.

8 So I think I would be in favor of tabling
9 it for now, if you will, and at some point if it
10 seems appropriate to resurrect it, then we can do
11 that.

12 MR. BURCHFIELD: Thank you. That's
13 helpful.

14 MS. GARZA: Can I ask by a show of hands,
15 then, which Commissioners agree with the
16 recommendation of the Criminal Working Group--not
17 describing the people on the working group,
18 obviously--on issue number one?

19 [Commissioners vote by show of hands.]

20 MS. GARZA: Okay. Can I ask--let me
21 phrase it this way and slightly change the
22 phrasing. Can I ask for a show of hands by the

1 Commissioners of those who agree with the
2 recommendation that Mr. Shenefield gave us, that
3 for now, we table looking at the issue of
4 sentencing guidelines and revisit as appropriate
5 later in the process?

6 [Commissioners vote by show of hands.]

7 MR. JACOBSON: That is not how I
8 understood the recommendation.

9 MS. GARZA: Okay.

10 MR. JACOBSON: I thought the
11 recommendation to be to put it on the list, but to
12 have it at the end of our process rather than to
13 leave it off the list, and maybe I misunderstood.

14 MR. SHENEFIELD: I fail to detect any
15 practical difference between the two. I'm happy
16 with either formulation.

17 MS. GARZA: I take it that we do have a
18 consensus that everybody believes that now is not
19 the time to look at it, and at some point, whether
20 it's on the list or off the list or on the list in
21 brackets, we'll commit to revisit it at an
22 appropriate time.

1 [Commissioners vote by show of hands.]

2 MS. VALENTINE: So it's on the list?

3 MS. GARZA: We'll keep it on the list
4 with the caveat that we don't think it's--it's
5 something that we may want to look at in the future
6 depending on developments.

7 MR. SHENEFIELD: On the list, but
8 deferred.

9 MS. GARZA: Deferred. Very good. Thank
10 you. That was word I should have found.

11 Can I ask, then, with respect to issues
12 not recommended for study, three through eight,
13 whether there is any Commissioner that wants to
14 propose that an issue be considered for study?

15 MR. YAROWSKY: Except as modified by John
16 and Sandy, that they'll make some inquiries on No.
17 7.

18 MS. GARZA: Except with that
19 modification.

20 So we'll take it, then, that all the
21 Commissioners with that modification, the consensus
22 is not to study these issues with that

1 qualification. Could I have a show of hands just
2 that people agree?

3 [Commissioners vote by show of hands.]

4 MS. GARZA: Okay. Good.

5 Well, that concludes that, and this is
6 actually pretty amazing, because we're exactly on
7 time, which means that we've merited a ten-minute
8 break.

9 [Recess.]

10 IV. MERGERS WORKING GROUP RECOMMENDATIONS

11 MS. GARZA: I'd like to try to keep to
12 our schedule. We're going to move on now.

13 The next set of working group
14 recommendations relates to mergers, acquisitions,
15 and joint ventures. This was the one done by what we
16 call the Mergers Working Group.

17 We had six recommendations and six issues
18 we recommended for study, three that a majority
19 recommended against study. Because of the length
20 or the number of issues, to allow discussion among
21 the Commissioners, I'm not going to take much time
22 in reviewing each of the issues right now. I would

1 note, though, that Issues 1 and 2 really are
2 somewhat companion issues. We set them out as
3 separate issues for purposes of addressing them in
4 the memorandum, but, arguably, they really are one
5 issue group. I would also point out that Issue No.
6 8, which is an issue not recommended for study,
7 does go to the question we discussed earlier in the
8 context of the International Working Group in
9 response to Don Kempf's questions, and I think
10 maybe some other people, but this was the one that
11 was an issue that involved whether steps should be
12 taken to attempt to harmonize further at least the
13 procedural aspects of review of mergers by the U.S.
14 and non-U.S. competition authorities.

15 So we may want to discuss that. Like I
16 said, it's below the line right now in terms of the
17 working group having recommended against its study,
18 but given the discussion earlier today, I think
19 we'll want to discuss that a little bit further.

20 So before we vote or do a show of hands,
21 I'd like to invite questions from the Commissioners
22 on Issues 1 and 2, if there are any questions on

1 things that people want to discuss.

2 Were there any questions that anybody had
3 or wanted to discuss on Issue 3? This was the
4 issue whether we should look at--whether revision
5 should be made to the Hart-Scott-Rodino merger
6 review process.

7 MR. JACOBSON: Madam Chair?

8 MS. GARZA: Yes, Jon.

9 MR. JACOBSON: I actually want to go back
10 to Issue 1.

11 MS. GARZA: Okay.

12 MR. JACOBSON: I think Issue 2 is an
13 issue that no matter what we do, we need to
14 consider. The allocation of responsibility between
15 the Justice Department and Federal Trade Commission
16 and particularly merger review is undoubtedly an
17 issue of importance, and there have been steps
18 taken in the recent past with Charles James and Tim
19 Muris to address those issues that proved to be
20 ineffective. It was an issue that was raised by
21 some of the most respected practitioners and former
22 enforcers with whom we've had discussions during

1 the outreach process, and I don't want to denigrate
2 the importance of the issue.

3 It is one where I believe it is better
4 suited for a different process, and that process
5 would be for the senior officials at the Justice
6 Department and the Federal Trade Commission to sit
7 down with appropriate representatives of the Hill
8 and look at an allocation of responsibilities that
9 would be acceptable to the Legislative Branch and
10 efficient in terms of allocation of
11 responsibilities among the agencies. I think what
12 Chairman Muris and Assistant Attorney General James
13 started to undertake is clearly the right process. It
14 was supported by a number of bipartisan groups. It was
15 clearly a step in the right direction. It was
16 taken before this Commission was even a gleam
17 in anyone's eye, and given the other issues
18 where I think we could make a greater contribution
19 to the law and the policy, this is one where,
20 notwithstanding the recommendation of the working
21 group, I think we should give some consideration to
22 recommending here today that a different process be

1 undertaken to achieve the same objective.

2 MS. GARZA: Can you elaborate what you
3 mean by a different process to achieve the same
4 objective?

5 MR. JACOBSON: Just what I indicated
6 before, have the Assistant Attorney General and his
7 or her representatives and the chairman or
8 chairwoman of the FTC and their representatives
9 create a small group that works with the appropriate
10 committees on Capitol Hill to come up with an
11 allocation of responsibilities that the agencies
12 believe is appropriate and that the Legislative Branch
13 believes is appropriate.

14 MS. GARZA: I'm sorry. I misunderstood.
15 I thought maybe you were addressing the issue
16 whether the Commission should look at it.

17 John, I think you were next.

18 MR. WARDEN: I think what Jon has said,
19 basically, might be the end result of our study of
20 the issue. I don't think that means we shouldn't
21 study the issue.

22 MS. GARZA: Debra.

1 MS. VALENTINE: Ditto.

2 MS. GARZA: Just to put my--I think this
3 is part of what Jon was saying, to think that
4 anybody is going to abolish either the Federal
5 Trade Commission or the Antitrust Division is
6 probably unrealistic. On the other hand, the
7 working group recognized that there seems to be a
8 perception, at least, by people that there is
9 inefficiency caused by having two separate agencies
10 looking at the same--looking in the same area and
11 that this has caused problems where people either
12 feel that they get different treatment depending on
13 what agency they are at or that the fact of the
14 split jurisdiction with no clear lines has caused
15 delay in merger investigations, for example, that
16 is undesirable.

17 So I think whether or not we actually go
18 so far as to recommend a restructuring of the
19 Federal antitrust enforcement institutions, there
20 seems to be some worth to shining the light on the
21 question of whether or not there are some
22 significant inefficiencies and whether there are

1 some steps along the lines you described or others
2 that would help to remedy that.

3 Any other comments?

4 I think earlier nobody had wanted to
5 address any questions or comments on Issue No. 3.

6 Were there any comments or questions on
7 Issue No. 4? This is the one that dealt with what
8 role, if any, should private parties and State
9 Attorneys General play in merger enforcement,
10 should merger enforcement be limited to the Federal
11 level or should other steps be taken to ensure that
12 a single merger will not be subject to challenge by
13 multiple private and government enforcers.

14 Jon.

15 MR. JACOBSON: In the working group, I
16 voted no, particularly on studying private
17 enforcement. My own world view of things is that I
18 don't see a problem in State enforcement either,
19 but consistent with the legislative history of the
20 statute that created us, I'm certainly comfortable
21 with having that issue looked at; but I think
22 Question 4 could appropriately be restated as

1 should the federal judiciary have any role in
2 federal merger enforcement, which is almost a
3 tautology, because the answer is yes, and we
4 need to recognize that private enforcement is not
5 self-effective. Private enforcement works only if
6 a Federal judge grants a preliminary injunction or
7 permanent injunction blocking a merger.

8 The number of cases where private
9 enforcement has interfered with a legitimate merger
10 transaction, I believe can be counted on no
11 fingers, and given the minor role that private
12 parties have played in merger enforcement, the
13 potential benefits that can be had from private
14 enforcement when Federal agencies say, you know,
15 we're just too busy and the many, many, many other
16 issues on which this Commission can do far more
17 good, I think this is an issue that we should not
18 study.

19 MS. GARZA: Don.

20 MR. KEMPF: It's not no hands, because I
21 have both defended and prosecuted private merger
22 actions. I represented, for example, Bell Atlantic

1 and Nynex in their challenge to AT&T's
2 acquisition of McCall Cellular, and we settled on
3 the Saturday before the Tuesday we were to go to
4 trial, and I think it was 1994, with substantial
5 relief. In fact, the only relief we didn't get was
6 to break AT&T into AT&T and Lucent, which I had
7 taken the depositions of a number of the senior
8 executives, including Rich McGinn, and I saw the
9 documents that were on the horizon anyway.

10 So as I closed it out, I said, Gee, we're
11 getting delayed secondary relief before we get all
12 the relief we seek. So just to correct the factual
13 thing, though, those kind of actions do exist.

14 MR. JACOBSON: And the Bon-Ton case
15 actually resulted in a judgment, but the--

16 MS. VALENTINE: For some reason, we can't
17 hear you.

18 MR. JACOBSON: I'm sorry.

19 MS. GARZA: It is on?

20 MR. JACOBSON: I usually hear the
21 opposite, which is stop talking.

22 There is also the Bon-Ton case in the

1 Western District of New York where there was
2 actually a judgment in favor of the plaintiff and
3 the State of New York in that case.

4 My overall point is that the number of
5 transactions that have been interfered with through
6 private enforcement is small, and the only case
7 where you're going to have private enforcement that
8 poses a real threat to a transaction is where the
9 parties believe the federal judge is going to
10 believe that transaction violates the
11 antitrust laws, and what's wrong with that?

12 MS. GARZA: We want to make sure, of
13 course, that we don't get into discussing the
14 issues as opposed to discussing whether to study,
15 but with that--

16 MR. YAROWSKY: Jonathan, I do admire your
17 point and your continued advocacy to try to have
18 vigorous enforcement at all levels. I certainly
19 share that.

20 I wasn't on this group, but just reading
21 the documents before me, as long as there is no
22 presumptiveness, that just studying it is to try to

1 reach a result to eliminate any of these
2 enforcement mechanisms, then I have no problem with
3 studying it as long as there is no presumptive
4 quality behind the question itself, and I don't
5 detect any.

6 So I guess during the debates in the
7 working group, I assume that's what it is, just to
8 study it.

9 MS. GARZA: Right.

10 Makan.

11 MR. DELRAHIM: If I could just say ditto
12 to what Jon said. I think it's important,
13 especially if we're going to be looking--you know,
14 to the extent people, whether in this Commission or
15 outside, look at international, when we're
16 advocating eliminating duplicative review of
17 mergers, we should at least take a look and see at
18 dual enforcement, particularly for mergers that
19 have national impact.

20 MR. KEMPF: If I may make one comment,
21 Madam Chairman.

22 MS. GARZA: Don.

1 MR. KEMPF: For those of you who have
2 looked at the memorandum of this working group,
3 which I was on, there is a notation on the first
4 page that Commissioner Kempf does not join in the
5 discussion and commentary of the issues. I had a
6 feeling as we went through the various working
7 groups that I was on, at least, that there was a
8 concerted effort to the drive the ultimate
9 conclusions in casting the work group memo. I was
10 comfortable with all of the yes recommendations by
11 the committee, but notwithstanding that, I did not
12 want to join in the discussion because I disagreed
13 with some of the substance that was set forth in
14 the discussion.

15 I just wanted to explain why I had that
16 notation in there.

17 MS. GARZA: Okay. Anyone else?

18 Debra.

19 MS. VALENTINE: One somewhat different
20 point, which is--and maybe it would be more useful
21 to discuss this when we get to the civil procedures
22 group, but there will be a similar proposal to

1 study interaction among state, federal, and private
2 actors there, and I guess I would want us at least
3 to stay open to thinking about them in
4 combination. There may, in fact, be certain
5 benefits and efficiencies that the states and the
6 feds have gotten in merger protocols that could be
7 applied to non-merger matter or there could be
8 reasons why mergers were distinct, and I guess
9 that's a different kind of discussion than
10 we want to have now, but I would like to raise
11 that.

12 MS. GARZA: Also, just for the
13 clarification of folks in thinking about this
14 issue, the issue wasn't really intended to be
15 framed to presume any conclusion, nor was it framed
16 to necessarily assume that there would be a yes-no
17 kind of decision. If you read the memo and I think
18 some of the comments we've gotten, there are
19 suggestions that have been made as to basically
20 harmonizing in a sense the enforcement regime so
21 that you don't have duplication, but that you don't
22 necessarily exclude completely either enforcement

1 actions by the State AGs or by private parties, for
2 example, with respect to the mergers and other
3 actions that don't have affects beyond particular
4 States.

5 So in looking at it and just to clarify
6 in voting on it, I don't think any Commissioner
7 should assume that any particular result is
8 signaled by the recommendation to study.

9 Were there any Commissioners that wanted
10 to ask a question or make a comment on Issue No. 5?

11 Sandy.

12 MR. LITVACK: Yes, and my question is why
13 isn't it or is it subsumed in No. 6? I would have
14 thought it was.

15 MS. VALENTINE: Good question.

16 MS. GARZA: Well, I think--let me go back
17 to it. I think in a sense, it is, but I think that
18 it reflects a perhaps difference of viewpoints
19 within the working group, because I think that
20 there may be some folks that felt that a general
21 examination of the efficacy of U.S. merger
22 enforcement policy was too broad or had objection

1 to that, but other people felt that at the very at
2 least, the questions of efficiencies and how
3 efficiencies will be treated would still be
4 appropriate.

5 So you're right. There is some overlap,
6 but that's why they're presented the way they are.

7 MR. LITVACK: I would think if we're
8 doing six, five would be within it. If not, then
9 maybe five stands alone.

10 MS. VALENTINE: The only difference, I
11 think, between five being part of the efficiencies
12 analysis in the merger enforcement process is that
13 five also encompasses the courts, and I think there
14 was some discussion as to whether the courts are,
15 in fact, up to date in how they think about
16 efficiencies.

17 Now, whether this group can do anything
18 about that is a very different issue.

19 MS. GARZA: But if you look, too, at page
20 13 of the memo, you see that the thought with six
21 was a fairly broad one as well. It included the
22 possibility even in doing the kind of survey or

1 study that, for example, Attorney
2 General--Assistant Attorney General Hew Pate had
3 recommended. So you're right. If you went with
4 six, I think that would subsume five, but there
5 were certain people that felt strongly about five
6 and less about six.

7 Did anyone want to--Jon.

8 MR. JACOBSON: As you know, I was at the
9 center in the working group on both Issues 5 and 6,
10 let me discuss them both briefly.

11 When we're talking about Issue 5 and
12 possibly when we're talking about Issue 6, we're
13 talking about our first foray into the substantive
14 guts of Section 1, Section 2, Section 7, and I
15 think that is an area where we need to tread
16 appropriately lightly.

17 There has been no indication that I've
18 seen that this is a problem that requires review.
19 The courts have begun to take efficiencies into
20 account. As the common law process continues, that
21 can be expected to continue. The agencies
22 certainly do, although they have a consumer rather

1 than total welfare approach to the evaluation of
2 efficiencies. It's an area where I would stay out
3 on the basis that I just don't see enough cause for
4 the Commission to interfere, potentially interfere,
5 in that area.

6 Issue 6, I am content with the
7 recommendation that just happens to come under
8 single firm. It could come under any number of
9 working groups that we study, the so-called new
10 economy issues. Again, that is one where I think
11 the legislative history of the statute that created
12 us would make it an abdication of our function not
13 to study that issue.

14 But I think for us to take up Issue 6,
15 particularly as written, would be to convey the
16 belief that there is some impairment of the
17 competitiveness of U.S. companies through U.S.
18 merger enforcement, which I view of as one of the
19 most, you know, horrific false myths out there. I
20 see Commissioner Leary here. He has a paper from a
21 couple of years ago called the "Consistency of U.S.
22 Merger Enforcement", and he analyzed merger

1 enforcement over a number of decades, demonstrated
2 the soundness of it, demonstrated the bipartisan
3 nature of it. Why is this something that this
4 Commission with its limited are resources needs to
5 spend time to reconsider?

6 MS. GARZA: John Warden.

7 MR. WARDEN: Well, I don't agree with the
8 comment that to take it up suggests that there
9 is a problem that has to be fixed, but having said
10 that, I agree with most of the rest of what Jon
11 said. I would make five and six very low priority
12 items; and six, it seems to me unless the review is
13 very superficial, could be intensely resource
14 consuming, and here I do associate myself with the
15 comment expressly that if there isn't a problem,
16 why try to fix it.

17 MS. GARZA: Dennis.

18 MR. CARLTON: I think I disagree. More
19 generally, as I think the point was just made,
20 reviewing antitrust policy is the charge of this
21 Commission, and I don't know how you can review
22 antitrust policy if you only focus on what you

1 think are problems. Not recognizing that what
2 you're doing may be useless or harmful, even if no
3 one else has raised it, is something that it seems
4 to me we should be looking at. That is one of the
5 broad questions not just in merger policy, but in
6 general.

7 I think it's essential that we ask are we
8 on the right track, are we doing things that are
9 correct, are we doing things that are incorrect.
10 If you look at the commentary on Item 6, it's quite
11 broad. It says you should look at are we defining
12 markets correctly, are we correctly inferring a
13 relationship between concentration and
14 competitiveness of markets, which, by the way,
15 might be quite different in high-tech industries
16 than in low-tech industries.

17 Well, I don't see how we can take our
18 charge seriously unless we have an answer to that
19 question for merger policy as well as what I will
20 argue this afternoon for vertical policy also; and,
21 therefore, I think it is important that we look at
22 it, we look at whether, for example, market

1 definition is articulated in the guidelines, which
2 has made its way into the courts, is it sensible,
3 is it not sensible.

4 Although many people I've spoke to on the
5 Commission as well as elsewhere seem to have an
6 understanding of how they define a market, it turns
7 out to be different than what the economic
8 definition is in the guidelines. That tension
9 seems to me to be something that could lead courts,
10 as distinct from maybe the agencies who have a lot
11 of experience more than courts, into a trap, and it
12 seems to me it's precisely those types of areas
13 that we should identify.

14 And as far as what the consequence of
15 merger policy has been on international
16 competitiveness, I don't presume to suggest that
17 it's had an anticompetitive effect necessarily, but
18 Item 5 is closely related to that topic. That's
19 all I would point out. If you focus only on a
20 consumer standard, you could be impairing mergers
21 that create efficient firms globally, and that
22 could impair our ability to compete.

1 That is an issue that some countries, like New
2 Zealand for example, have taken very seriously, and
3 I think it is, you know, perhaps, as Sandy said,
4 more generally part of Item 6, but that's why I
5 think a topic like six is an important one for us
6 to look at.

7 MS. GARZA: Yes, Don.

8 MR. KEMPF: Ditto as to both five and six
9 with two additions.

10 MS. VALENTINE: Ditto to Dennis?

11 MR. KEMPF: Ditto to Dennis, yes.

12 I support having them on the list for all
13 the reasons Dennis enumerated and I won't
14 re-enumerate them. I would make two additions:
15 One, in what I called earlier a thoughtful letter
16 by Assistant Attorney General Pate, he lists this
17 and, indeed, it is the very first thing he lists.
18 So if the chief antitrust enforcement officer in
19 the United States thinks that this is not only
20 worth study, but puts it first on his list, that
21 certainly influences me.

22 Secondly, picking up on one of the things

1 Dennis says, and that is the issue of whether
2 enforcement is currently useless or harmful, there
3 is recent and respected scholarship by people like
4 Bob Crandall and others to suggest that's precisely
5 what the effect of antitrust enforcement is. So
6 against that recent scholarship, I think it's
7 particularly important we do this.

8 MS. GARZA: Anyone else?

9 Debra.

10 MS. VALENTINE: I actually would like to
11 concur with the views of John Warden. I think
12 these are very low priority items, ones on which we
13 could spend lots of time without making any
14 significant contribution at the end of the day. I
15 think that particularly with respect to No. 6, the
16 agencies have recently held several-day symposia.
17 The view that one will hear from the agencies, the
18 ABA, virtually anyone, is that, in fact, U.S. merger
19 enforcement policy is effective and is operating
20 well, and without--you know, we were to spend all
21 of our time on that alone, we might say something
22 somewhat different and interesting, but I would not

1 put five and six on the list of issues to study.

2 MS. GARZA: Do you want to respond to
3 that or can I have a say?

4 MR. LITVACK: Sure.

5 MS. GARZA: Okay. I find myself agreeing
6 with Dennis and Don, and I'm losing track who else
7 was there, but not to re-articulate what they said,
8 but I'd add a few other potentially less important
9 things to consider; but one of the things, to me
10 merger enforcement is a such a large part of
11 antitrust and has such a potentially significant
12 affect on our economy that it would be odd not to
13 look at it. I mean, I take our charge as being to
14 look at the antitrust laws and determine whether
15 issues exist and changes have to be made, and there
16 is a tendency within the antitrust bar to be very
17 comfortable with where we are in merger enforcement
18 because we think we understand it, but there are
19 recurrent issues outside the antitrust bar, and the
20 stakeholders and people who tend to be clients of
21 many of us, but also people who represent consumer
22 interests, I don't think that they are as

1 comfortable as are we of whether or not the
2 enforcement policy right now is exactly what it
3 should be or at least they would like to get the
4 assurances of a commission such as ours and looking
5 at it to say, yes, we think it's on the right
6 track, we've looked at these things, or, no, these
7 things may need to be adjusted or government should
8 consider this.

9 This is also somewhat unique in the
10 merger area where obviously the courts are involved
11 in enforcing merger-antimerger law. Unlike Section
12 1 and Section 2 cases, it is an area where law is
13 made and decisions are taken, certainly, by the
14 antitrust enforcement agencies without the
15 involvement of any court, and so you do have a
16 transparency issue as well that I think we could
17 address through the work of the Commission.

18 Finally, while it is true that the DOJ
19 and the FTC, and they are to be commended for it,
20 have themselves taken efforts to review their own
21 policy and the efficacy of enforcement programs,
22 which is great and they're to be commended for it,

1 but I think there is something that we can add
2 because we aren't the enforcement agency and we're
3 in a position to basically report to the President
4 and to the Congress whether we think antitrust
5 merger enforcement is on the right track or not.

6 So that's why I find myself on the side
7 of Dennis and Don and perhaps others.

8 Sandy.

9 MR. LITVACK: I'm not going to add
10 anything to what you said. I agree with Don and
11 yourself. I think the last point you made is
12 telling to me, and that is it is fine for the
13 agencies to declare that everything is wonderful
14 because they're doing a great job. Our mission is
15 different and our make-up is different and our
16 composition is different for a reason, and the
17 point you make, I think is telling and at least to
18 me dispositive that we should look at this.

19 MS. GARZA: Debra.

20 MS. VALENTINE: Can I make one more
21 comment?

22 I think there's something of a

1 misrepresentation of what Mr. Pate's letter said,
2 and I don't think--I hope that if we even do take
3 on five and six, that does not mean that we are
4 doing what Mr. Pate said in his first item in his
5 letter. I agree that it is a very thoughtful
6 letter. His first request is for an empirical
7 study of all antitrust enforcement. That would
8 cost a ton of money. Whether we could recommend
9 that the agencies or that someone else should do
10 that, whether that would be or could be done
11 consistent with the Paperwork Reduction Act even is
12 a big issue.

13 So I hope that by voting on five and six,
14 the fact that someone here misstated what Mr.
15 Pate's letter said does not mean that we would be
16 necessarily recommending to do what is in the Pate
17 letter.

18 MS. GARZA: Bobby.

19 MR. BURCHFIELD: I agree with the comment
20 that Assistant Attorney General Pate's letter is thought-
21 ful and well stated, but I also agree that Don's
22 comment about addressing merger enforcement

1 encompasses only one component of that letter. I
2 read the letter as encompassing that, as Don does,
3 but I agree with you that that's not all that it
4 says in that first point.

5 But I do hope, Madam Chairman, that we'll
6 have the opportunity to discuss the Assistant Attorney
7 General's suggestion that an empirical study be
8 done by this Commission because I think it's a
9 thoughtful and productive suggestion. The resource
10 issue is going to be part of that discussion, I
11 think, but I think we ought to discuss that. If
12 the head of antitrust enforcement at the Department
13 of Justice believes it would be productive for us
14 to do an empirical analysis of whether enforcement
15 over the last several decades has shown benefits to
16 consumers and promoted competition in this country,
17 I take that to heart.

18 MS. GARZA: Yeah, and we do plan to
19 address that recommendation and perhaps others this
20 afternoon in the general discussion of issues,
21 since it was one that didn't easily fall into a
22 working group and we got it a little bit--well, we

1 got it after the working groups had considered
2 their issues.

3 MR. BURCHFIELD: Correct.

4 MS. GARZA: Okay. Makan.

5 MR. DELRAHIM: Just to make a point of
6 clarification--

7 MS. GARZA: Do you want to compliment
8 Hew for the record?

9 MR. DELRAHIM: I think it's a very
10 brilliantly written letter.

11 One thing is that I think it is
12 important, what he did raise in that first issue,
13 but I don't think the recommendation should be
14 taken as the Commission necessarily implementing
15 that study rather than suggesting that such a study
16 be established by some group of experts, which
17 might take, as his letter says, several years to
18 do, but not so much the Commission undertake the
19 whole study, but something that could be useful to
20 the enforcement community.

21 MS. GARZA: Okay.

22 MR. JACOBSON: Ditto.

1 MS. GARZA: Ditto. Good. That's good,
2 Jon. We've made progress.

3 MS. VALENTINE: Vote.

4 MS. GARZA: Did I hear a noise over
5 there?

6 MR. SHENEFIELD: Vote, she said.

7 MS. VALENTINE: Vote.

8 MS. GARZA: All right. Let us, then, by
9 a show of hands--I'll try to figure out whether we
10 should do these first. We'll discuss the issues
11 not recommended for study.

12 On Issue 1, which was the divided
13 responsibility for enforcing antitrust laws between
14 the FTC and the DOJ, can the Commissioners indicate
15 by a show of hands whether they concur with the
16 recommendation to study that issue?

17 [Commissioners vote by show of hands.]

18 MS. GARZA: And the related, somewhat
19 related, issue, No. 2, to the extent that dual
20 enforcement continues, should steps be taken to
21 eliminate differences in treatment, can I have a
22 show of hands to indicate concurrence on that

1 recommendation?

2 [Commissioners vote by show of hands.]

3 MS. GARZA: On Issue No. 3, review the
4 Hart-Scott-Rodino merger review process, can I get
5 a show of hands on consensus on that
6 recommendation?

7 [Commissioners vote by show of hands.]

8 MS. GARZA: Issue No. 4, enforcement by
9 private parties and state attorneys general, can
10 Commissioners indicate by show of hands whether
11 they agree with the recommendation?

12 [Commissioners vote by show of hands.]

13 MS. GARZA: Five and six, I'm going to
14 ask for a show of hands separately with the
15 understanding, however, that five is somewhat
16 subsumed in six. Can I get a show of hands for
17 those Commissioners who would be in favor of a
18 recommendation to study at least the efficiencies
19 aspect of merger review?

20 [Commissioners vote by show of hands.]

21 MS. GARZA: And can I get an indication
22 of Commissioners who agree with the recommendation

1 in item six?

2 [Commissioners vote by show of hands.]

3 MS. GARZA: Okay. There were three
4 issues not recommended for study. One of them was
5 No. 8, which was the harmonization of procedural
6 issues.

7 MR. YAROWSKY: I think we talked about
8 that earlier, but let me--

9 MS. GARZA: John?

10 MR. WARDEN: I was just going to move
11 that we amend that to get rid of the words "at
12 least" in the first line so that we're talking only
13 about procedural harmonization.

14 MS. GARZA: All right. We'll do that.

15 All right. Let's go through the three
16 issues then. With a show of hands, indicate whether
17 you with agree with the recommendation not to--

18 MR. KEMPF: I'd like to make a comment.

19 MS. GARZA: I'm sorry. Don.

20 MR. KEMPF: On No. 7, which is in the no
21 category right now, my concern is this: There is
22 a--well, first of all, I have a real question

1 whether the guidelines make any sense at all, but
2 even if they do make sense, there is such a
3 disconnect between the guidelines and what actually
4 occurs that the guidelines really serve principally
5 as a trap for the unwary right now. Anybody, any
6 firm that looked at those and took serious guidance
7 from them, would be misguided in what they do, and
8 so my reason that I wanted to look at that was that
9 right now, not looking at it disserves everybody
10 except those who are very sophisticated and pay no
11 attention to the guidelines and look to actual
12 practice.

13 But, supposedly, the guidelines were
14 written as something people who could look to with
15 confidence to determine, to know, what federal
16 antitrust enforcement policy was, and they don't
17 reflect that, and someone has to step up and say
18 that. I don't understand why we wouldn't do that.

19 MS. GARZA: Dennis.

20 MR. CARLTON: Comment: Is it possible
21 to--the point Don is making seems like it might be
22 the conclusion of what you want to say in seven,

1 and the commentary on seven, you know,
2 makes the point that the agencies have issued
3 reports explaining exactly what they're doing, and
4 an alternative to having them as two separate
5 issues is to have seven encompassed as part of what
6 we say in six, and we say something like,
7 see what the agencies have said about how they
8 enforce the guidelines. I don't know whether that
9 would satisfy Don.

10 MR. KEMPF: It would satisfy me.

11 MS. GARZA: Yeah. It occurs to me as
12 well that to the extent that the Commission engages
13 in a study of Issue No. 6, it's likely that the
14 question of whether the agency merger guidelines
15 accurately reflect what they're actually doing will
16 come up.

17 MR. KEMPF: That's fine.

18 MS. GARZA: Okay. On eight, can I get
19 a--I'm sorry. Jon.

20 MR. YAROWSKY: I'm on eight.

21 MS. GARZA: Okay.

22 MR. YAROWSKY: I just want to harmonize

1 No. 8 which talks about harmonization. We talked
2 earlier in the international discussion about an issue
3 which touches the same--goes in the same
4 direction. I think with John's suggested
5 modification of just to study the harmonization of
6 the procedural aspects, I certainly would support
7 that. I think that would be very useful. I said
8 that in the earlier discussion, but I just wanted
9 to be sure we sync up.

10 MS. GARZA: Right.

11 MR. KEMPF: It strikes me that it is, in
12 fact, subsumed within the Issue 3 in international
13 which we adopted.

14 MS. VALENTINE: No.

15 MS. GARZA: No.

16 MR. DELRAHIM: I think there was some
17 debate that it was not subsumed.

18 MS. GARZA: No. Three, we voted on and
19 it was very narrowly construed. So the question, I
20 think, is that there appeared to be some
21 Commissioners who would vote contrary to the
22 recommendation of the working group to include

1 eight, striking the words "at least" from that, and
2 include that as an issue for study.

3 Can I get a show of hands of
4 Commissioners who agree with that?

5 MR. CARLTON: I'm just a little confused.

6 MS. GARZA: Okay.

7 MR. CARLTON: Could you answer Don's
8 question as to why? I thought Item 3 on
9 international was specified to be just the
10 technical and procedural changes.

11 MS. GARZA: Right. Exactly. And that's
12 why--

13 MR. CARLTON: Isn't that what eight says?

14 MS. GARZA: No. If you go to the memo on
15 the international, you'll see references
16 specifically to the IA--

17 MS. VALENTINE: IAEAA.

18 MS. GARZA: Yes. And also that was the
19 second thing. There were two specific, very
20 specific--

21 MS. VALENTINE: One was technical
22 assistance and one was the IAEAA potential

1 requirement to share merger-related materials with
2 non-antitrust agencies being a possible thorn to
3 the accomplishment of additional cooperation
4 agreements with other countries.

5 MS. GARZA: Right. So I think, Dennis,
6 it has not been covered by three, is the point. So
7 the issue now is whether Commissioners would vote
8 to recommend eight for study, and that covers the
9 procedural.

10 I'm sorry. Jon Jacobson, do you have a
11 quick comment.

12 MR. JACOBSON: My comment is that since
13 we can't change--we can't change any laws, but the
14 only recommendations we can make that will get any
15 traction whatsoever, if any, are going to be to
16 change U.S. law. So why is this the correct body
17 to address harmonization issues? I suggest it
18 isn't, and I will vote no to that.

19 MS. GARZA: Just one point, and you may
20 want to make it, I mean, I think that we understand
21 that there may be some sentiment up on the Hill to
22 include this as part of their agenda.

1 MS. VALENTINE: I have a proposal for
2 that, perhaps. I happen to agree with Jon, that
3 as phrased it says, should steps be taken to
4 attempt to harmonize further procedural aspects of
5 reviews of U.S. and non-U.S. competition
6 authorities. Now, if the E.C. has one statute
7 that says you have to file a Form CO with certain
8 kinds of documents and materials and they have a
9 certain time line and we have another statute, a
10 Hart-Scott-Rodino Act, that says we file certain
11 materials with certain time lines, we can't change
12 either of those statutes and we certainly can't
13 change the European one.

14 If Congress wanted to direct specific
15 questions or issues to us, I think it would be
16 highly appropriate for us to encourage that and to
17 respond to it. I don't think we can pontificate
18 about what other countries should be doing with
19 their merger laws. We could do it, but we would
20 have absolutely no affect.

21 MS. GARZA: Right. I think the motion
22 was not that we would do that, but rather we would

1 help to advise the Congress whether we perceived
2 that this was a burden, the lack of--or the extent
3 to which it was a burden, the lack of convergence
4 and what areas might be suitable for there to be
5 diplomatic solutions.

6 Makan.

7 MR. DELRAHIM: Yeah, and also, I mean, we
8 can pontificate on the U.S. government's efforts in
9 this region. I mean, just like trade laws, we do
10 not go abroad and force countries to change their
11 laws; however, we do take efforts through the trade
12 rep's office to either enter into agreements--I
13 think Congress in enacting this statute that
14 created us, as well as Chairman Sensenbrenner's
15 comments--you know, he authored this bill. They
16 really did have in mind our review, and I think
17 when we were talking about No.--when we were
18 discussing Issue No. 3 in the international memorandum,
19 you know, we did vote to limit it to the two specific
20 examples; however, those were examples of--not
21 exhaustive examples of the procedural efforts by
22 the United States.

1 Now, technical assistance is one. Those
2 are some of the efforts that the agencies engage
3 in, but also, you know, there are agreements, not
4 just the IAEA, but merger comity agreements or
5 civil enforcement comity agreements that we have
6 with the E.C. and we've had for 10, 15, years.

7 I think the Commission should study,
8 overall survey, the various efforts the United
9 States has been taking and see what works, what
10 doesn't. We mentioned, you know, some of the
11 funding issues. The agencies do communicate with,
12 as Debra knows better than anyone here, with the
13 foreign authorities, and what are some of those
14 efforts, I think should be the subject of the study
15 of this Commission.

16 MS. GARZA: Sandy.

17 MR. LITVACK: I guess I'm constrained to
18 agree with Job Jacobson and Debra, because--and
19 maybe I just got this all wrong. I read the
20 question and the answer is sure,
21 yes.

22 MS. VALENTINE: Sure. Yes.

1 MR. LITVACK: Yeah. Should they be
2 harmonized? Why not? Of course. So okay. Now
3 we're done. What are we going to do? Are we going
4 to then go on to say let me tell you how you do
5 this? I don't know that we have any particular
6 expertise in doing that or why we should be doing
7 it, and if Congress is looking to us to tell them
8 how that should be accomplished, I think they're
9 looking at the wrong place.

10 So as much as I'd like to broaden our
11 task, I'm constrained to agree that this is not up
12 our alley.

13 MS. GARZA: Jon.

14 MR. YAROWSKY: I completely hear what
15 Sandy is saying in terms of that set of
16 recommendations, how to do it. I mean, we're not
17 telling sovereigns anywhere how to do anything. I
18 think my sense of what's going on the Hill is,
19 one, they certainly want our view of the various
20 efforts going on, kind of a survey that Makan has
21 sketched.

22 The other side of it is simply in a

1 global economy where merger transactions today
2 often involve review by multiple jurisdictions,
3 what are the costs of multiple review where there
4 aren't harmonized procedures and does this have
5 some positive or negative consequences. I think
6 that's what they want to know, and then they can
7 make a decision about whether to implement or begin
8 negotiations or things like that. I mean, it's a
9 more constrained area of inquiry.

10 MR. JACOBSON: In 30 seconds, the answer
11 to that is self-evident: The larger the
12 transaction, the greater the cost. The more
13 countries, the greater the cost. So the answer,
14 again, as Sandy put it, is yes.

15 So they now have that answer because I
16 think we can all agree on that. I like Debra's
17 suggestion, if you have specific questions, please
18 pose them; we'll do our best.

19 MS. GARZA: Let me ask, because I wanted
20 to take up on Deb's suggestion and ask whether it's
21 realistic for you and others to have conversations
22 with the folks on the Hill who suggest this may be

1 on their agenda and determine from them whether
2 this is something useful and get a better sense of
3 what we might usefully do for them in this area so
4 we have a better target to shoot at.

5 MR. DELRAHIM: In one of the two
6 agencies, I think, who engage in this.

7 MS. GARZA: Right. So why don't we
8 do--similar to what we did in the other earlier
9 group where we had John and Sandy agreeing to do
10 some leg work, why don't we agree to do that. John
11 and I and perhaps others will do that on this
12 issue.

13 MR. YAROWSKY: Okay.

14 MS. VALENTINE: And I'd be happy to help
15 with that also.

16 MS. GARZA: Okay. And just to formalize
17 this issue, can I have a show of hands of people
18 who agree with that approach?

19 [Commissioners vote by show of hands.]

20 MS. GARZA: All right. Then nine,
21 because we're running a little tight now, can we I
22 have a show of hands for Commissioners who agree

1 with the recommendation not to study the question
2 of tying the issue of filing fees to the antitrust
3 budgets?

4 MR. KEMPF: I don't think we took a vote
5 on seven, did we?

6 MS. GARZA: Didn't we take a vote on
7 seven?

8 MR. YAROWSKY: Well, the discussion was
9 going about how six and seven--

10 MS. GARZA: Right, right, right.

11 MS. VALENTINE: Although seven is two
12 questions. So it gets a little more confusing. I
13 think everybody would vote against.

14 MS. GARZA: Let me just ask. Can I have
15 a show of hands for Commissioners who agree with
16 the recommendation not to separately study the
17 issues presented in seven?

18 [Commissioners vote by show of hands.]

19 MS. GARZA: All right. Thank you. Sorry
20 that this has gone on a little bit long.

21 V. CIVIL PROCEDURE WORKING GROUP RECOMMENDATIONS

22 MS. GARZA: We want to turn now to Civil

1 Procedure Working Group recommendations.

2 MS. VALENTINE: Okay.

3 MS. GARZA: Is that you, Debra?

4 MS. VALENTINE: Yes, that is me. I will
5 go as quickly as possible.

6 The first issue: Should substantive law
7 and procedures applicable to indirect purchaser
8 litigation be modified? I think everyone has read
9 the memo. Everybody knows Illinois Brick and its
10 consequences. If there are any questions, I'm
11 happy to answer questions.

12 Number two, what changes, if any, should
13 be made to the enforcement role that States play
14 with respect to the federal antitrust laws?
15 Comments?

16 Number three, what should be the remedies
17 and legal liabilities in private antitrust
18 proceedings? Here, this question covered a panoply
19 of issues, and, in fact, we thought it would be
20 wisest to look at them together, subjects such as
21 treble damages, joint and several liability,
22 prejudgment interest, attorney's fees, and standing

1 to pursue injunctive relief.

2 At the time that the working group was
3 looking at these issues, we actually chose to put
4 down as a not recommended issue No. 7, should
5 government remedies be expanded, restricted, or
6 clarified. At the time, we thought that the FTC had
7 recently done a fair amount of thinking about
8 disgorgement and that there was perhaps not much
9 more to do there. Subsequently, we did receive Mr.
10 Pate's letter. He raised the issue of civil
11 penalties and other government remedies, and I
12 think several members of the working group have
13 subsequently suggested that perhaps it makes not
14 much sense to study private remedies without
15 putting them in the context of also looking at
16 government remedies.

17 And so I think what I would do is
18 recommend that the Issue 3 be combined with Issue 7
19 and voted as an issue jointly in terms of are
20 remedies appropriate to deter and punish, are they
21 accomplishing their objective or not.

22 And then let's see. I guess any

1 questions or issues on that we want to
2 discuss?

3 MS. GARZA: Let me just say that I agree
4 with that approach.

5 MR. YAROWSKY: I hate to back you up, but
6 I do want to just back up just for a brief
7 discussion and understand the context of the
8 Illinois Brick discussion. Lexecon, and I wasn't,
9 of course, in that group, so I wasn't privy really
10 to your discussion. I mean, I do see kind of the
11 logical train to include Lexecon, but that begins
12 to become a long reach, raises a whole set of
13 issues kind of beyond just Illinois Brick. Is
14 that--I mean was that thoroughly discussed? I see
15 the logical train of it, but it's a large reach
16 over there.

17 MR. JACOBSON: Can I respond to that? I
18 think I was the proponent for putting the Lexecon
19 issue in for this narrow purpose, and the narrow
20 purpose is if we are going to consider some means
21 of consolidated private actions that involve both
22 direct and indirect purchasers or otherwise

1 tinkering with indirect purchaser liability, even
2 if we have a removal provision, the current problem
3 being that you get sued in 33 States and the
4 District of Columbia, if you have a removal
5 provision, that still allows for the potential at
6 least for gamesmanship because people can refuse to
7 settle and say I'll wait until I get back to my
8 home jurisdiction. It's important at least to
9 consider. No one is making any determinations.
10 We're just putting the issue on the agenda,
11 consider the potential for an overall consolidation
12 so that a single court will have substantive
13 control, not just procedural control, of the entire
14 case, and that's the reason for inclusion of the
15 issue.

16 MR. YAROWSKY: Okay. It's just that
17 there is a lot of overtones with Lexecon if you're
18 following it on the Hill. The Judicial Conference has
19 studied it in other contexts, a pretty definitive
20 study. State court judges have studied it.

21 As I said, I do see, Jonathan, how you
22 got there. I'm just saying it's a huge area

1 fraught with a lot of concerns.

2 MS. VALENTINE: I think the concept would
3 be that at this point, obviously, we don't know
4 what any final recommendation here will be. I
5 mean, there could be a recommendation to have
6 federal indirect suits and no state ones. There
7 could be a recommendation to do anything.

8 MR. JACOBSON: Right.

9 MS. VALENTINE: And so at the end of the
10 day, if one aspect of the recommendation were to
11 require--it would be in that context--excuse
12 me--desirable to have consolidation. I think it
13 should be open to us to look at it, understanding,
14 of course, that like so many of these issues in the
15 civil procedure area, you fall over into general
16 tort reform and class action issues, and we would
17 not necessarily presume that it would have to be
18 part of any final recommendation, but that it might
19 be a desirable aspect of one.

20 MS. GARZA: Don.

21 MR. KEMPF: Illinois Brick is one of two
22 decisions that are really married at the hip. The

1 first is Hanover Shoe and the second is
2 Illinois Brick. Hanover Shoe said that if you're
3 an indirect purchaser who suffered damage--

4 MS. VALENTINE: Direct purchaser.

5 MR. KEMPF: --excuse me--an indirect
6 purchaser who suffered damage--excuse
7 me--a direct purchaser who did not suffer
8 any damage, you could still recover.
9 To make it symmetrical, they then held that if you
10 were an indirect purchaser that suffered severe
11 damage, you can't recover.

12 The result of the two cases is that many
13 people who are injured can't recover and many
14 people who are not injured can. And the States
15 quickly said this is a nutty outcome and have their
16 own reversals within the States of the
17 Illinois Brick half of that pair of cases. So you
18 have massive forum shopping, fights between federal
19 and state things, all the problems that Jon
20 alluded to, but they really derive from a
21 fundamental set of decisions that ought to be
22 looked at, and we ought to make a recommendation on

1 it.

2 MS. GARZA: Any other comments?

3 Bobby.

4 MR. BURCHFIELD: Debra, when you proposed
5 that--and I hope that this isn't changing topics,
6 but when you proposed that No. 7 be incorporated
7 into No. 3 as a result of Mr. Pate's letter, did
8 you mean to incorporate seven as a whole or just
9 the potential for civil monetary remedy for the
10 government? Because I had read his letter as being
11 limited to that, and if these other issues about
12 the broad scope of remedies have already been
13 thoroughly studied and in particular in light of
14 the Booker decision, I think probably a civil
15 damages remedy becomes more pertinent now than it
16 was six months ago .

17 MS. VALENTINE: I mean, I'm happy to
18 limit it to that. I'm happy to defer to other
19 members on this. I don't want to make any
20 authorial decisions here.

21 MR. WARDEN: I think seven meant civil
22 remedies.

1 MS. VALENTINE: Right.

2 MR. WARDEN: Government civil remedies.

3 The others were studied elsewhere.

4 MS. GARZA: Yeah. So civil remedies.

5 We'll just insert "civil" between government and

6 remedies then so people are clear about what the

7 proposal is.

8 MR. WARDEN: Right.

9 MR. JACOBSON: If I could just make a

10 brief comment on three, I will vote for

11 consideration of No. 3. In the working group, I

12 was an advocate of a more limited analysis of

13 certain aspects of the remedial scheme. I

14 understand the will of a significant majority of

15 the Commission to look at issues more broadly, and

16 I will accede to that.

17 I don't want our review to suggest that

18 there is a presumption that there is anything wrong--or

19 for that matter anything right, with the existing

20 regime, simply that it's sufficiently important to

21 the administration of the antitrust laws that this

22 Commission should take a look at it.

1 MS. GARZA: Okay.

2 MR. YAROWSKY: Again, this is going to
3 sound rather technical, but I'm sure I know the
4 answer, but I do want to ask and direct it to the
5 working leader of that group.

6 On No. 1, I do understand the discussion
7 about Lexecon, but, again, looking at the broader
8 field, the word "antitrust" really doesn't appear
9 in one. It appears in everything else. I assume
10 you're talking about indirect purchaser antitrust
11 litigation.

12 MS. VALENTINE: Correct.

13 MR. YAROWSKY: Because I'd like to keep
14 it--

15 MS. VALENTINE: Absolutely, correct.
16 Yes. Yes. Yes.

17 MR. YAROWSKY: All right. Thank you.

18 MS. GARZA: Okay.

19 MR. WARDEN: Might I just inquire what
20 other kind of indirect purchaser litigation you
21 might have in mind? Because I might like to
22 include it.

1 [Laughter.]

2 MR. YAROWSKY: There is some creative
3 pleading going around, but, no, I think if we just
4 agree to the antitrust side, I think we're in good
5 shape.

6 MR. WARDEN: Can you answer my question,
7 Jonathan? Is there some other form of indirect
8 purchaser litigation of which we should be aware?
9 Because it comes up under the rubric of state
10 unfair competition laws or something that really
11 shouldn't be encompassed in this, and wouldn't be
12 if that word were inserted.

13 MR. YAROWSKY: Can I answer that?

14 MS. GARZA: Yes.

15 MR. YAROWSKY: I don't know all the
16 consumer protection statutes in the states. I
17 mean, those phrases could come up in other areas,
18 and I just want to be sure we, you know, have our--

19 MR. WARDEN: Well, to the extent that
20 state consumer --quote, consumer protection, closed
21 quote, statutes are, in fact, disguised antitrust
22 statutes or disguised Federal Trade Commission

1 acts, I would not like to exclude the
2 interrelationship of those with the ones brought
3 under laws expressly captioned as antitrust laws
4 from our consideration.

5 MR. KEMPF: I don't think this does,
6 because what you're saying is that they're
7 disguised antitrust.

8 MR. YAROWSKY: Right.

9 MR. JACOBSON: Brief comment: There are
10 of late--if you look at the indirect purchaser
11 cases that are being filed today, a number of them
12 are not filed under the state antitrust laws. They
13 are, in fact, in the State of New York, for
14 example, filed under consumer protection-type
15 statutes because, for example, in New York, you
16 cannot get class certified in a Donnelly Act
17 case. You can in a general business law case.

18 I think John's suggestion, though, is
19 accurate, and we're talking about antitrust-type
20 claims. So what we might do is modify the
21 language to say indirect purchaser litigation based
22 on claims arising out of competition-related

1 offenses, and I think that would achieve all of our
2 objectives.

3 MR. WARDEN: That's okay with me.

4 MS. GARZA: Okay. Did the staff get
5 that?

6 MS. VALENTINE: Thank you, Mr. Jacobson.

7 MS. GARZA: Thank you.

8 MS. VALENTINE: Let's see. Where did we
9 leave off?

10 No. 4 of issues recommended: Should the
11 FTC be given greater authority to weigh antitrust
12 and economic expertise when selecting
13 administrative law judges? Yes. We all thought
14 this was a no-brainer.

15 And should use of neutral experts in
16 antitrust cases be encouraged is the final
17 recommended issue.

18 Issues not recommended are: Should the
19 agencies establish timetables for investigating and
20 deciding civil non-merger matters?

21 We've discussed No. 7, which is the
22 government civil remedies.

1 Eight, should the Federal Trade
2 Commission be provided be a limited exception to
3 the Sunshine Act so that its Commissioners could
4 deliberate matters without going through formal
5 Sunshine Act procedures? While we're sure this is
6 all very desirable, we decided not to create
7 individual agency exemptions and to let the agency
8 address that.

9 And, finally, No. 9, should the
10 Commission recommend different standards for filing
11 or certifying class actions for separating common
12 injury and common damages issues or propose other
13 changes in class action procedures in light of
14 evolving jurisprudence or increasingly evident
15 problems with the current system? And here, it was
16 generally agreed among the working group that there
17 are many other forums addressing tort reform these
18 days and that it would be the wiser side of valor
19 to defer to others on those.

20 MS. GARZA: Okay. Debra, I'm inclined
21 when we get to voting on the recommendations to
22 vote against the recommendations four and five just

1 because of, again, the sort of the notion of
2 limited resources and where it would be a priority,
3 but I wondered whether anyone on the working group
4 had anything to say that would suggest that they
5 really felt that it was a high priority which
6 should be included.

7 John.

8 MR. WARDEN: Well, I think four isn't
9 very important, but should be included because it
10 won't consume any resources in my judgment. Five
11 could be dropped so far as I'm concerned.

12 MS. GARZA: Sandy.

13 MR. LITVACK: I'm on the working group
14 and I would vote against four and five, and, again,
15 in good part, it's a prioritization issue. I just
16 don't think it rises to that level.

17 MS. GARZA: May I ask a question? Has
18 the FTC requested legislative change or any kind of
19 change itself that would allow it greater authority
20 to select ALJs with experience?

21 MS. VALENTINE: I think it has certainly
22 considered that. We know that the Patent Office

1 does that. I think that given separation of powers
2 issues, it actually might look better for us to
3 make that kind of a recommendation than for the
4 Commissioners who are the reviewing body of the
5 ALJs to be making recommendations about what comes
6 to them.

7 I do think that the quality of the ALJs,
8 if we are going to have a Federal Trade Commission
9 as an independent agency with supposed expertise
10 in antitrust and consumer protection law, I think
11 the quality of the ALJs is very important and
12 particularly as the Commission seems to be doing
13 more activities in part three proceedings in its
14 agency proceedings, that it would be extremely
15 beneficial to have intelligent, rational,
16 thoughtful, economically informed people working on
17 those cases.

18 Now, I think many of us thought exactly
19 as John Warden did, that this should not consume
20 any resources. If you want to ask the agencies
21 further as to what their past efforts have been,
22 feel free to go ahead and do so. I'm not as

1 specifically aware of when the last time they may
2 have gone to the Hill is.

3 MS. GARZA: Don.

4 MR. KEMPF: I'm going to vote against
5 both four and five for a slightly different reason.
6 Back when I was trial lawyer, people used to say to
7 me, Well, when you're trying these antitrust cases,
8 wouldn't you rather have a judge than a jury, and I
9 would always say which judge, because antitrust,
10 much of it is not factual or legal, but what I'll
11 call religious in the sense that it's not a fact
12 question; it's a question of fundamental beliefs,
13 and I always found great comfort in juries. I
14 think they bring a collective common sense, and
15 whether I want an administrative law judge who has
16 more or less or antitrust or economic expertise
17 depends where he sits on that spectrum, and I would
18 rather not encourage that one way or the other.

19 And with experts, I've had a lot of
20 expertise with neutral experts, some positive and
21 some negative, and so if I were framing the
22 question, I would frame it as should that

1 encouraged or discouraged. One of the problems, is that
2 some of the judges hire an independent expert and
3 it is all ex parte. Some have it some ex parte.
4 Some of them, he never testified; he just confers
5 with the judge in chambers and neither side knows
6 what the heck is going on.

7 So my own view is it should be
8 discouraged, but I don't think it's something
9 that--I don't think either one warrants any of our
10 time.

11 MS. GARZA: Makan.

12 MR. DELRAHIM: Ditto.

13 MS. GARZA: Okay.

14 MR. YAROWSKY: I just wondered from the
15 full Commission whether we could really get some
16 bang for the buck so that when John Shenefield and
17 Sandy Litvak sit down with Hew Pate for 15 minutes
18 to talk about timetables on criminal matters, could
19 they also maybe bring up timetables on civil
20 non-merger matters, and then we'd had a good sense
21 of where the agencies are on both.

22 MR. KEMPF: If the question is can we

1 expand our charter, I'm very comfortable with that.

2 MS. GARZA: Okay. Can we just formalize
3 that? Can we have a show of hands of the people
4 who agree?

5 [Commissioners vote by show of hands.]

6 MR. JACOBSON: I'd like to participate in
7 the small group as well.

8 MS. GARZA: Okay.

9 MS. VALENTINE: Okay. Are we ready to
10 vote?

11 MS. GARZA: Then can I have a show of
12 hands, then, for those Commissioners who agree with
13 the recommendation of the working group on Issue
14 No. 1 with the modification that was discussed?

15 [Commissioners vote by show of hands.]

16 MS. GARZA: Okay. And what about No. 2;
17 can I have a show of hands for those who agree with
18 its study?

19 [Commissioners vote by show of hands.]

20 MS. GARZA: Okay. And then on three
21 paired with seven as was discussed, can I have a
22 show of hands of Commissioners who agree with its

1 study?

2 [Commissioners vote by show of hands.]

3 MS. GARZA: Okay. Can I have a show of
4 hands for Commissioners who agree with the study of
5 Recommended Issue No. 4?

6 [Commissioners vote by show of hands.]

7 MS. GARZA: All right. And can I have a
8 show of hands for Commissioners who would agree
9 with study of Recommended Issue 5?

10 [Commissioners vote by show of hands.]

11 MS. GARZA: Okay.

12 MR. KEMPF: Did four fall off too?

13 MR. HEIMERT: Yes.

14 MS. GARZA: I don't know where the vote
15 tally is.

16 MR. HEIMERT: Yeah. It appeared to me
17 that there was not a majority who thought we should
18 study that.

19 MS. GARZA: Six, we've already voted on,
20 and we'll expand the task of John and Sandy and
21 whoever else to also cover this area.

22 Seven, we've already dealt with.

1 Can I have a show of hands of
2 Commissioners who agree with the recommendation not
3 to study Issue 8?

4 [Commissioners vote by show of hands.]

5 MS. GARZA: All right. And can we
6 finally have a show of hands of those Commissioners
7 who agree with the recommendation of the working
8 group not to study Issue 9?

9 [Commissioners vote by show of hands.]

10 MS. GARZA: All right. Great.

11 With that, then we will break for lunch
12 and hope to resume the meeting at 1:30.

13 [Whereupon, at 12:22 p.m., a lunch recess
14 was taken, to reconvene at 1:30 p.m. this same
15 day.]

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1 differently under the antitrust laws than other
2 industries? As I said, this is a topic that both
3 the ABA Antitrust Section and the House
4 Judiciary Chairman Sensenbrenner had high on their
5 list, and it was topic that we thought was an
6 appropriate one for the Commission to study, and
7 there was uniform consensus to study this topic.

8 So I would be happy to answer any
9 questions, but if there are no questions, in the
10 interest of saving time, I could go on.

11 The second topic was how the
12 current intellectual property regime affects
13 competition. The issue here is whether
14 the changes in the last decade or two in
15 the creation of intellectual property and the
16 creation of patent rights has led to some adverse
17 affects on competition because of the granting of
18 patents that either aren't true intellectual
19 property or because of various types of
20 cross-licensing agreements have that have arisen.

21 There was some discussion as to whether
22 we could say much about intellectual property law

1 because that's, obviously, beyond our charge, but
2 there was also a strong feeling that we could say
3 something to the extent that patent pools and
4 cross-licensing raise antitrust issues that are
5 more important now than they were before and, in
6 particular, whether there has been a misuse of the
7 patent law, adversely affecting competition.

8 There were several other topics we
9 examined and at the subcommittee meeting voted not
10 to study. Let me just go down some of them, and I
11 have some new information on at least one that I want
12 to report.

13 The first topic that we voted not to
14 study was whether there should be a duty to deal in
15 intellectual property, and what we thought about
16 were circumstances in which there should be such a
17 duty versus circumstances in which there should not
18 be such a duty, indeed, whether any such
19 circumstances might exist for either category.
20 There was a debate on the subcommittee. The
21 subcommittee was divided, and I was in favor of
22 studying this topic. It struck me as an important

1 one in light of the concerns people have about the
2 property rights you need in order to motivate
3 innovation and, therefore, if you reduce those
4 property rights, whether it would have an adverse
5 affect on innovation. Like I said, this was a
6 close call, and I think it would be appropriate to
7 have a discussion of this topic if people wanted
8 to. Like I say, that was a close call.

9 On Item 4, there have been several cases
10 involving abuse of the standard-setting process
11 recently. The subcommittee examined the issues
12 that these cases raised and did come to the
13 conclusion that they thought ultimately the
14 consensus of the subcommittee was that maybe these
15 issues would be more appropriately handled by the
16 private parties as they learned what the cases
17 implied.

18 Since that, writing this report, we've
19 received a number of letters from private parties
20 in which they raised not only that issue and
21 probably disagreed with the consensus of the
22 subcommittee on that issue, but they raised one

1 additional issue which the subcommittee had not
2 discussed, and that has to do with the fact that in
3 several standard-setting organizations, one of the
4 terms is that you will license your patents on
5 reasonable and non-discriminatory terms; however,
6 you are not allowed in the deliberation of the
7 standard-setting procedure of many standard-setting
8 organizations to discuss what you mean by
9 reasonable royalties. And several commenters since
10 this subcommittee report was issued raised the
11 question whether that was appropriate, whether
12 their fears of discussing royalties in a common
13 setting were justified. They say they are and they
14 urged us to reconsider.

15 Several people on the subcommittee have
16 contacted me and said that likely would have
17 changed their vote. So I would say Item No. 4
18 probably would have been above the line had we
19 thought of the issues that were raised in the
20 letters.

21 The next issues, I'll go through
22 relatively quickly. There has been a Standard

1 Development Organization Advancement Act that was
2 recently passed. The question is should this
3 Commission evaluate it. It was the decision not to
4 evaluate it. It just recently was passed. We
5 don't have much history with the act. It also is
6 quite narrow in that it applies only to the
7 standard-setting organization and not to its
8 members.

9 The sixth issue was whether the antitrust
10 laws should deal with certain problems that arise
11 in particular industries, in particular, efforts in
12 the drug industry to use patents to foreclose
13 competition. The sense of the committee was that
14 although these are definitely serious issues, they
15 weren't of a general enough concern to apply
16 broadly to merit our consideration given our
17 limited resources, and also there was a feeling
18 that these would probably be worked out by the
19 courts.

20 The seventh issue was to investigate
21 whether the FTC and DOJ diverge on antitrust and IP
22 and whether we should reconcile those differences.

1 There was a sense that is being worked out now
2 between the FTC and DOJ, and it was unclear whether
3 we could add much to resolve their differences, to
4 the extent there are any.

5 The eighth topic was whether the patent
6 system should be replaced with something else.
7 Although an interesting suggestion, that seemed
8 well beyond the charge of this Commission. So we
9 voted no on that one.

10 Then, finally, there was a question as to
11 whether we should institute or recommend programs
12 to collect data from researchers interested in
13 intellectual property. The feeling was that to the
14 extent we thought that was necessary, while we were
15 studying these other issues, we wouldn't feel
16 precluded from mentioning that, but that as a
17 separate topic, we did not think it would be
18 appropriate.

19 So I'm happy to answer any questions if
20 there are any.

21 MS. GARZA: John.

22 MR. WARDEN: I have one. I read the

1 supporting memorandum to cast Issue No. 2, which I
2 support, in a much broader way than your
3 description, Dennis, which seemed to narrow it to a
4 couple of specific issues like patent pools and so
5 on. I favor it in the broader way that it's
6 articulated in the memorandum.

7 MR. CARLTON: Let me just say I didn't
8 mean to narrow it from necessarily what it was in
9 the report.

10 MR. WARDEN: Thanks.

11 MS. GARZA: Jon.

12 MR. JACOBSON: Yes. As a member of the
13 working group, I understood it to be in the broader
14 sense, and I think the memorandum accurately
15 reflects our discussions.

16 The discussion we had was not to
17 replicate, but to build on the prior work that the
18 FTC had done in terms of its hearings and its
19 report. Its report had a number of recommendations
20 which do go to the substance of the patent laws as
21 well as their interface with the antitrust laws. I
22 don't think it is comprehensible to study the

1 affect of intellectual property on competition
2 without delving at least into what the patent laws
3 do, and I view that as entirely within our province
4 and support that examination.

5 MS. GARZA: Any other comments?

6 MS. VALENTINE: Yes. Only one small
7 question, which is Dennis has proposed placing
8 Issue No. 4 above the line, which I think in light
9 of some of the letters received is certainly a nice
10 way of reconciling what we've chosen to study with
11 what others are urging us to study.

12 My only issue there is that four as
13 phrased is quite broad in terms of misleading
14 conduct and possible abuses of the standard setting
15 process. I think that the one issue that the
16 various companies, organizations, etc., who wrote
17 and fairly highlighted was that this refusal ex
18 ante to even discuss reasonable royalties. I think
19 a lot of the other issues in terms of disclosure
20 and possible abuses, let's say, that Dell and other
21 people got out are now being addressed by those
22 standard-setting bodies and probably are best

1 addressed by them.

2 I also think that the FTC and DOJ held
3 hearings on this, and presumably they'll come out
4 with a report saying something about all of that.
5 So I'm just not sure we want to take on as broad a
6 range of things as is potentially encompassed by
7 four.

8 MS. GARZA: Sandy.

9 MR. LITVACK: I'm almost going the other
10 way and asking are you really suggesting that Item
11 4 be added to focus on one question, whether or not
12 discussions in these standard-setting contexts of
13 the royalty rates is permissible or not, and if
14 that's what we're doing, why? Why would this
15 Commission be answering that question? Let the
16 enforcement agencies, let the court, let somebody
17 else answer it.

18 MR. CARLTON: What the letters indicated
19 is that many standard-setting organizations have
20 taken the position and instructed people not to
21 talk about reasonable royalties, and, therefore,
22 the members of those standard setting organizations

1 have said that has delayed and in some sense
2 gutted the value of a standard-setting procedure.

3 MR. LITVACK: The only point I'm making,
4 and I'll just make it and move on, is it would
5 seem to me that there are ways to get that
6 resolved, that is not the function of this
7 Commission, to give advisory opinions.

8 MR. WARDEN: How about a business review
9 letter?

10 MR. LITVACK: There are lots of ways.
11 Business review would be one.

12 MS. GARZA: I have a question in that
13 regard, because it wasn't clear to me whether four
14 and five were somewhat linked. I thought that
15 maybe part of what the proposal was that the
16 Standard Development Organization Advancement Act
17 maybe wasn't sufficiently broad and didn't cover
18 those kinds of activities, only covered the
19 standard-setting organization and not the members.

20 So my question is whether or not it makes
21 sense in light of the input that we've gotten after
22 publishing the working group memos to look more

1 broadly at whether there is any need for additional
2 assistance or redress on the standard organization
3 issue and including potentially even recommending
4 an amendment to the Act, although I recognize it's
5 fairly new.

6 Jon.

7 MR. JACOBSON: In the discussion within
8 the subgroup, I believe there was a general feeling
9 that both issues were below the line, that the FTC
10 and DOJ--

11 MS. GARZA: Can you pull your microphone
12 up?

13 MR. JACOBSON: I'm sorry. That the FTC
14 and DOJ, particularly the FTC, are bringing
15 appropriate cases, commencing the process of common
16 law resolution of these issues in a sensible,
17 organized coherent fashion that is a traditional
18 way antitrust law develops, that they are going
19 about it in the right way and that there's little,
20 candidly, for us to add to the common law
21 processing that respect.

22 There was very little discussion of the

1 act, although it was an issue that was considered
2 and rejected for review. The Act is a very narrow
3 exemption from the antitrust laws. If we're going
4 to look at standards at all, and I would prefer to
5 see the common law process run its course, then I
6 think we should look more broadly at it. I, for
7 one, don't believe in most antitrust exemptions,
8 and if there is a rule of reason that can be
9 applied to standards development entities, there is
10 no reason that the same rule shouldn't be applied
11 to its members.

12 I personally would keep both of these
13 issues below the line, but respect other views.
14 Certainly, when companies as important to the
15 economy as Cisco and Sun and Hewlett-Packard all
16 feel that this is an issue that we should address,
17 you have to respect that.

18 MS. GARZA: Jon.

19 MR. YAROWSKY: I just want to address the
20 SDO act that was just passed. You know, it may
21 even be far narrower than we've discussed so far.
22 Not only does it just apply to the standard

1 development organizations and not to members, but a
2 very select group of SDOs in the sense that they
3 have to comply with what is called voluntary
4 consensus standard organizations, which are based
5 on certain criteria set out in an OMB circular.
6 That sounds very arcane and I'll move on, but what
7 I'm trying to say is Congress really granulated
8 this, obviously set out--not only set out a rule of
9 reason for what they defined as standard-setting
10 activities, but then also excluded from that
11 definition any of the per se offenses.

12 So even if you were conducting
13 standard-setting activities, it could never involve
14 price-fixing. It could never involve market
15 allocation. It could never involve boycotts, and
16 it only applied to SDOs. So, again, not just in
17 complete defense of what Congress just spent three
18 and a half years doing, but at least on that
19 subject, I think it's fairly exhausted and it's
20 fairly narrow.

21 MS. GARZA: But that would suggest that
22 the issue that Debra raised is a real one because

1 of a carve-out, if you will. It could be attacked
2 as price-fixing or boycotting in some
3 circumstances.

4 MS. VALENTINE: Well, that's a question
5 under what the act seems to exclude, are
6 discussions of prices and costs that aren't
7 reasonably related to the adoption of the standard,
8 but one could argue that ex ante, the discussion of
9 what a reasonable royalty is, in fact, reasonably
10 related to the adoption of the standard and you
11 can't gain the process because you don't even know
12 if your patent is going to be reading on the
13 standard.

14 But, I mean, this may be getting too
15 small.

16 MR. YAROWSKY: Can I just say one thing?
17 What you're referring to in terms of description of
18 the excluded activity is really a term of art that
19 derives from the original National Cooperative
20 Research Act of 1984. Remember, the same voluntary
21 notification system was first used for R and D
22 joint ventures. Okay? In '93, Congress amended

1 that act to allow to be extended to production
2 joint ventures.

3 This is the third chapter of that, and so
4 that phraseology that you have cited really is a
5 term of art that goes back to the original act.
6 That's why it was really used. There is a savings
7 clause, from what I remember in that act, that
8 basically is a standstill so that this act doesn't
9 affect current antitrust law and does not affect
10 intellectual property law in terms of where the law
11 is going.

12 So, again, this act is to be
13 construed--this is not in the legislative history.
14 It's actually in the plain language of the act.
15 This act is not to be construed to interfere with
16 developing case law either in the antitrust area or
17 the intellectual property area. So what I'm giving
18 you is just my view that I think it's fairly fresh
19 and I'm not inclined to recommend that we go back
20 into it.

21 MR. KEMPF: Deborah?

22 MS. GARZA: Don.

1 MR. KEMPF: I would not add it. I read
2 with care and interest the letters suggesting this.
3 They do more than suggest that we study this
4 subject of price-fixing and the standard-setting
5 process. They recommend flat-out that we authorize
6 price-fixing in the standard-setting process,
7 price-fixing by the buyers, not the sellers. And I
8 think what has been suggested would be an abuse of
9 the standard-setting process. So I'm pretty much
10 against it.

11 It would probably be the first item that
12 the next Antitrust Commission, Antitrust
13 Modernization Commission, Exemptions and Immunities
14 Committees would look at several years from now.

15 But I do want to comment, secondly, on
16 Jon's observation that seems to suggest all this is
17 working out fine and hunky dory in the courts. I
18 think the reason people are embolden to ask for
19 things like that is because it's not working out
20 well in the courts. We have what I view as
21 wrong-headed decisions that seek to penalize
22 consumers and protect competitors to get a level

1 playing field and all the like. It's usually the
2 argument of people who are not good competitors,
3 and so--but I'm content to let that process
4 continue, not because I think it's going well, but
5 because I think it will self-correct.

6 MS. GARZA: All right. Any other
7 comments or questions?

8 Dennis, is there anything else you wanted
9 to--

10 MR. CARLTON: I don't have anything to
11 add.

12 MS. GARZA: All right. In that case,
13 then, can I ask the Commissioners by a show of
14 hands whether they concur in the recommendation of
15 the IP Working Group to study issue No. 1?

16 [Commissioners vote by show of hands.]

17 MS. GARZA: Okay. I'd ask by a show of
18 hands whether the Commissioners concur with the
19 recommendation to study Issue No. 2.

20 [Commissioners vote by show of hands.]

21 MS. GARZA: And I would like for the
22 Commissioners to indicate by a show of hands

1 whether they concur with the recommendation not to
2 study Issue No. 3.

3 [Commissioners vote by show of hands.]

4 MS. GARZA: Okay. I'd ask by a show of
5 hands whether the Commissioners concur with the
6 recommendation--I'm going to put it the way it's in
7 the memo, Dennis, for now, but the recommendation
8 as reflected in the memo not to study Issue No. 4.

9 [Commissioners vote by show of hands.]

10 MS. GARZA: Okay. Same question with
11 respect to five, concurrence not to study Issue No.
12 5.

13 [Commissioners vote by show of hands.]

14 MS. GARZA: Same question with respect to
15 six, concurrence not to study.

16 [Commissioners vote by show of hands.]

17 MS. GARZA: Issue 7, concurrence not to
18 study.

19 [Commissioners vote by show of hands.]

20 MS. GARZA: Issue No. 8, concurrence not
21 to study.

22 MR. KEMPF: What would the prize be?

1 [Laughter.]

2 MR. KEMPF: No. You can go ahead and
3 take a vote on it.

4 MS. GARZA: Eight?

5 MS. VALENTINE: Not?

6 MS. GARZA: Not.

7 [Commissioners vote by show of hands.]

8 MS. GARZA: And nine, consensus not to
9 study.

10 [Commissioners vote by show of hands.]

11 MS. GARZA: Thank you. That was very
12 efficient. Thank you, Dennis.

13 VII SINGLE-FIRM CONDUCT WORKING GROUP RECOMMENDATIONS

14 MS. GARZA: With that, we'll move into
15 the discussion on the Single-Firm Conduct Working
16 Group recommendations, and Jon Jacobson led that
17 group, so I'll turn to you.

18 MR. JACOBSON: Thank you, Deborah.

19 What I'd like to do is go through each of
20 the recommendations, pro and con, seriatim with a
21 brief discussion of the working group's
22 recommendation and the rationale therefore.

1 The first issue is basically whether
2 there are aspects of the new or modern economy that
3 warrant some different treatment. Some would
4 suggest more harsh treatment. Others would suggest
5 more lenient treatment for conduct, vertical or
6 single firm, and that is an issue that is at the
7 core of the rationale for the creation of this
8 Commission. It is one that certainly Congress and
9 Sensenbrenner felt strongly about. The limited
10 legislative history of the statute creating us puts
11 that at the very top of the list. I think there
12 are a number of Commissioners who may be of the
13 view that the answer to this question is not only
14 no, but an emphatic no, but I think it would be
15 disrespectful to the Congress that created us not
16 to evaluate this issue, and that was certainly the
17 unanimous view of the working group.

18 The second issue is whether the
19 Robinson-Patman Act should be reconsidered. The
20 antitrust cognoscenti have been posing that
21 question for decades. The Justice Department, as I
22 think everyone knows, doesn't enforce the statute,

1 views it as the property of the FTC. The FTC views
2 it as its property, holding its nose.

3 There are serious concerns about buyer
4 power, about the concerns that led to the creation
5 of the Act. There are certainly arguments that
6 have been advanced and that we expect will continue
7 to be advanced for retention of the Act, but the
8 issue is of enormous consequence to the United
9 States economy, and there was little controversy in
10 the working group in recommending this issue be
11 considered.

12 The third issue is at the core of
13 non-merger, non-cartel antitrust, and that is
14 whether the Commission should endeavor
15 to articulate standards for what constitutes
16 exclusionary or anticompetitive conduct, both under
17 Section 1 of the Sherman Act in vertical cases and
18 a similar standard will undoubtedly apply in
19 non-per se horizontal cases as well, as well as to
20 unilateral conduct under Section 2 of the Sherman
21 Act. There was division on the working group as to
22 whether we should undertake this particular task.

1 We'll get into that momentarily, but it was the
2 recommendation of the working group that this issue
3 be considered.

4 The fourth question is a good deal more
5 narrow. There is at least a perceived gap in
6 antitrust coverage in that Party A who solicits
7 Party B to join in a price-fixing conspiracy,
8 absent unusual circumstances where that conduct can
9 be characterized as an attempt to monopolize, as in
10 the Bob Crandall American Airlines case, is only
11 subject to prohibition under Section 5 of the FTC
12 Act, the remedy for which is simply a cease and
13 desist order.

14 There is a sense that conduct, at
15 least if undertaken covertly, can be sufficiently
16 pernicious that more serious Sherman Act-type
17 standards should be considered, and to evaluate
18 that question, the working group without
19 controversy recommended the study of that issue.

20 The fifth issue was by a divided vote,
21 and that is whether the Commission should undertake
22 a study of monopsony issues and particularly

1 single-firm exercises of buyer power. The majority
2 of the working group believed that particularly
3 since we're considering the Robinson-Patman Act,
4 Section 2(f) of which applies to buyer power at
5 least as exerted in commodity industries, that to
6 consider potential modifications or even repeal of
7 Robinson-Patman without looking into the larger
8 question of buyer power would not be appropriate,
9 and therefore a majority of the Commission
10 recommended study of that issue.

11 The first issue, in our speak, below the
12 line is market definition, and that is an issue
13 that is below the line again on the basis of a
14 divided vote. There was quite of bit of discussion
15 in the working group over that issue. A lot of
16 views were heard, pro and con. At the end of the
17 day, the majority of the working group concluded
18 that although the market definition process is
19 imperfect and flawed, that, in essence, it asks the
20 right types of questions and that the process of
21 adjudication through the agencies and the courts
22 should be allowed to continue to perfect methods of

1 analyzing market definition and that there was
2 little to that process that this Commission could
3 add.

4 Item 7 was initially above the line,
5 wound up, I believe, unanimously below the line
6 just in the interest of there is only so much the
7 Modernization Commission is going to be able to do.
8 That issue is whether the primary line aspects, the
9 predatory pricing aspects of the Robinson-Patman
10 Act, and the provisions of Section 3 of the Clayton
11 Act should be repealed, not as wrong-headed, but as
12 duplicative of the provisions of Section 2 and
13 Section 1, respectively. The consensus was that to
14 the extent these statutes are duplicative, as most
15 observers believe they are, they are not causing
16 undue harm and, therefore, the Commission's time
17 can be spent better on other tasks.

18 Issue 3, there was considerable
19 discussion about Section 8 of the Clayton Act. It
20 is a controversial statute. The mere fact of an
21 interlocking directorate does not ipso facto result
22 in a lessening of competition. The consensus of

1 the working group was that the statute does not
2 pose a sufficient problem to the economy to warrant
3 our attention, particularly in light of the unknown
4 circumstances that might prevail were the statute
5 to be repealed. We've had a regime since 1914
6 prohibiting interlocks among substantial
7 competitors, and were we to repeal that, the
8 consequences are unknown, and given our obligation
9 to do no harm, that issue fell below the line.

10 Finally, an issue that undoubtedly would
11 have drawn greater attention 15, 20 years ago,
12 resale price maintenance, the working group
13 unanimously concluded that although strong
14 arguments can be made for eliminating the Dr. Miles
15 per se rule for resale price maintenance, that
16 given the effect of the Business Electronics
17 against Sharp decision and given the Congressional
18 support year in, year out for maintenance of the
19 per se rule, that this was not an issue that the
20 Commission should spend time on.

21 Those are the working group's
22 recommendations, and I'll open it up for questions.

1 MS. GARZA: All right. Does anyone have
2 any questions or comments that they want to make on
3 any specific recommendations?

4 Sandy.

5 MR. LITVACK: I just had one, I guess,
6 which is did the group feel and, if so, was there
7 evidence before the group that led to its feeling
8 that the issue encompassed in No. 4 was
9 sufficiently, for lack of a better word,
10 widespread, recurrent, serious to warrant the study
11 here; and if so, I guess my question is what
12 evidence, if any, is there evidence that this is a
13 problem?

14 MR. JACOBSON: We did discuss that issue
15 briefly. We did not encounter any empirical
16 evidence that it is a widespread problem. Because it
17 involves covert activity, it's something that I
18 think would be impossible of its nature to develop
19 solid empirical data concerning. That doesn't mean
20 we wouldn't prosecute it if a revised statute were
21 passed precisely for the same reasons, but the
22 feeling was that the issue is sufficiently narrow

1 and probably not that controversial that it could
2 be addressed in short order and resolved by the
3 Commission in short order.

4 MR. LITVACK: Just one last comment, I
5 guess my point is I'm not sure that we're--it
6 sounds like we may be trying to devise a remedy for
7 a problem that doesn't exist or certainly doesn't
8 exist widespread, and the issue is not where you
9 come out, but is do you really want to spend the
10 time and the energy and the resources trying to
11 consider something that I don't think is a
12 widespread problem. Certainly there hasn't been
13 any history of it. You mentioned the Bob Crandall
14 situation, and that's about the only one I know of.
15 There may be some others, but certainly not
16 widespread.

17 MR. JACOBSON: Well, there have been a
18 number of cases that the FTC has prosecuted under
19 Section 5 over the years. So it's not sui generis,
20 but I don't think anyone can say that there is
21 empirical data to suggest it's a widespread
22 problem.

1 MS. GARZA: John Warden.

2 MR. WARDEN: I'll stick to four now, but
3 I have comments on three and five as well. I don't
4 see what's pernicious about this. If the
5 solicitation doesn't meet with success, there is no
6 economic harm, and the fact that we may all think
7 this is morally culpable conduct, which I certainly
8 do, doesn't lead me to believe that we need a law
9 to deal with it.

10 MR. SHENEFIELD: But that would lead to
11 repeal of all laws penalizing attempts if it didn't
12 result in a successful act.

13 MR. KEMPF: Yeah. Like attempted murder.

14 MR. SHENEFIELD: I think at least my
15 recollection of the working group was that it is an
16 anomaly to have criminal apply to the completed
17 agreement, but then have something as wishy--that's
18 the wrong way to put it--as far removed from
19 criminal law as possible, like the Federal Trade
20 Commission Act, apply to conduct that is just as
21 hard core bad. It just hasn't happened yet to have
22 reached a successful conclusion. Why would you

1 want that?

2 MR. WARDEN: I didn't say I wanted the
3 conduct, by the way.

4 MR. SHENEFIELD: The anomaly.

5 MR. WARDEN: I said it was morally
6 culpable. I don't think there is an analogy to
7 attempted monopolization, for example, which can
8 cause injury even if it doesn't succeed in
9 monopolizing, and nor is there the remotest analogy
10 to attempted murder, which is a breach of the
11 peace, whether it succeeds or not. That's my only
12 comment on that. I just don't think it's worth the
13 time and sweat.

14 MS. GARZA: Okay. Did you want to go on
15 to--you said you had something else.

16 MR. WARDEN: Three and five. Three in my
17 view is a black hole. We could have, you know,
18 that as our sole topic of inquiry were we to pursue
19 it, and it also refers to Section 1 which requires
20 more than a single firm. So I'm not sure why
21 that's part of this group, but this is just a
22 review of the standards developed by the courts for

1 administering Sections 1 and 2 of the Sherman Act,
2 and I don't think that's a particularly useful way
3 for us to spend our time or that we're likely to
4 reach a consensus or do anything that at the end of
5 the day benefits the public. Yeah. It would be
6 great if we could, if we were, you know, endowed
7 with genius and omniscience and come out with a
8 bright line of what is and isn't exclusionary
9 conduct. So I am definitely opposed to that.

10 No. 5, you know, it sounds interesting in
11 an academic sense and I see that there are people
12 who believe it's a problem, but I'm not sure how
13 real the problem is.

14 MS. GARZA: I ditto John on 3, 4, and 5,
15 but John Shenefield.

16 MR. SHENEFIELD: Just to respond on the
17 three points, first of all, one of the points of
18 criminal law is to deter conduct, and I don't think
19 there is any sensible argument that it would be
20 wise to have in place a law that deters
21 solicitation to commit a felony. So that's as to,
22 I guess, Item 4.

1 As to Item 3, I think the working group
2 was very much influenced, among other things, by
3 the letter from Senators DeWine and Kohl explicitly
4 requesting us: "We recommend you review the
5 current state of monopolization law in the wake of
6 Trinko." Now, the question is what use we can
7 contribute. There are two kinds of commissions,
8 one that recommends a statutory fix, another kind
9 that recommends or states what it perceives to be
10 the better view of the law, as, for instance, the
11 1955 Attorney General's Commission.

12 I don't know whether we can agree on not,
13 but I don't think we can just walk away from the
14 problem, because it is one of the central
15 controversies of current antitrust law, and it's
16 very much in the news since Trinko, and it's sort
17 of like the horizontal merger issue. It would be
18 far more comfortable if we didn't have to deal with
19 it, but it's there, and if this Commission is going
20 to have any credibility at all, it cannot walk away
21 from major issues like that.

22 As to five--well, I'll just stop there.

1 Three and four is enough.

2 MS. GARZA: Okay. Makan.

3 MR. DELRAHIM: As to No. 3, I agree. I
4 don't think that our limited resources or time is
5 worth spending trying to re-examine Trinko. I
6 think the standard is appropriate. There has been
7 some discussion, but whether or not, you know,
8 Section 2 standards should be revisited or we
9 should be moving towards the positions held in
10 Europe, I think that would be not necessarily the
11 best use of our time; however, 3(e) is an area that
12 I think is vitally important for us to examine.
13 This is the treatment of bundling and discounting
14 prices, and I guess in a similar way in industries
15 where there is a zero marginal cost, that's
16 probably more appropriate in Issue No. 1 that deals
17 with what's mostly appropriate in the new economy
18 areas where you have software.

19 But the bundling discount is a big issue
20 that we visited with the case from the Third Circuit
21 in LePage's. The agencies didn't recommend for
22 cert. to the Supreme Court. So the issue still

1 lingers without appropriate standards for firm and
2 what conduct could be subject to the antitrust
3 laws.

4 Now, whether we have the wisdom to
5 address that or not, I think it's perfectly
6 appropriate for the Commission and an important one
7 for both enforcers and the business community.

8 MS. GARZA: Don.

9 MR. KEMPF: I probably would not do one,
10 three, four, or five, but I do want to comment on
11 that, and I probably would do eight.

12 I would count myself instinctively among
13 those who would say not only is the answer no, it's
14 a resounding no on Question No. 1. I don't believe
15 in much of the new economy jargon. I think there
16 are new products and new methods, different methods
17 of distribution, a shorter time horizon, geographic
18 horizon, all the things that are part of what
19 people sometimes call the new economy, but I see no
20 reason why you would make the standards either more
21 lenient or more harsh. But if we want to spend
22 some time addressing it, I don't have a violent

1 objection to it, but I know where my instincts are.

2 As for Item 3, boy, I think that is
3 something that I care an awful lot about, but it's
4 a--did somebody use the phrase "black hole"? Yeah.
5 I'm going to, for example if we study that, say
6 that there is essentially no such thing as
7 predatory pricing and that most lawsuits brought
8 by competitors are brought not to any
9 anticompetitive situations, but to stunt
10 competition; and I don't mind, again, weighing in
11 on that, but that's an awful lot to chew on. Maybe
12 it's something we should chew on. I certainly have
13 no interest in gravitating toward Europe where
14 abuse of dominant power is just, again, a thing to
15 keep inefficient competitors alive.

16 But I'm comfortable however the committee
17 goes on that, but everybody should understand
18 that is an awful big thing to bite off.

19 I had really sort of a question you can
20 come back and answer on four. For example, I don't
21 know why it's limited to covert. Overt stuff, like
22 if some guy gets up at a trade association meeting

1 and says, You know what I think; I think we all
2 ought to raise our prices 10 percent next week, so
3 he couldn't be prosecuted for doing anything
4 covertly, and, you know, I would wonder why you
5 wouldn't do something that paralleled what the
6 Section 2 does, have the offense and attempt to
7 commit the offense and let it go at all that. Now,
8 I would be against it and would be against even
9 studying it, because Section 1 is one sentence
10 long, is as vague as a statute probably has ever
11 been written, and, you know, I think it was Mel
12 Brooks once said beauty is in the eye of William
13 Holden, and there's a lot to that. And if you
14 start trying to have an attempt to do something
15 that's ill-defined to start with, I just think you
16 subject people to a lot of risks improvidently. So
17 I would at the end of the day preserve the
18 asymmetry that we have.

19 The buyer power, I just think that's as
20 clear as the ass on any animal you name, and I
21 don't think there's any need to clarify it. So I
22 wouldn't spend any time of it.

1 The Clayton Act, maybe it's because I've
2 had a number of things over the years where
3 directorships have been precluded for idiotic
4 technical coverage of Section 8 and you spend an
5 inordinate amount of time looking at it, and I
6 think that is something that's been around for
7 a very long time, but desperately cries out for
8 modernization.

9 MS. GARZA: Dennis.

10 MR. CARLTON: I wanted to talk about five
11 and six. Let me first turn to six. I'd be in
12 favor of including six. Let me explain why, not
13 because I want to add more topics to what we study,
14 but because this is a topic, market definition,
15 that is at the heart of all antitrust cases. We've
16 already described in the merger memo how we're
17 going to talk about and analyze how markets are
18 defined. In the IP discussion we just had, we're
19 going to talk about how markets are defined. In
20 Topic 1 here, if you read the commentary, they're
21 going to talk about how markets are defined.

22 So I think a subtheme or a short summary

1 of what I just said is we're already discussing how
2 markets are defined.

3 Now, if you want that say, well, it's
4 only in high-tech industries we're going to study
5 it and only in merger context we're going to study
6 it on this Commission and that's going to narrow
7 things, I don't think that's helpful, and I think a
8 way to summarize what we should do is let's talk
9 about market definition in regular cases, in merger
10 cases, in vertical cases, new economy cases and see
11 if it's different; otherwise, I think you're going
12 to get a very disparate disconnected analysis.

13 So I actually would recommend that six go
14 above the line, but that we consolidate--maybe
15 after this meeting, the staff consolidate and say
16 we're studying market definition, because that's
17 what I think we are doing.

18 As far as Item No. 5, as an academic, I
19 don't have any problem studying any topic, and
20 buyer power is as good as any. I would say,
21 though--I was a member of the subcommittee--I would
22 vote against that. It's not my sense that it

1 is an issue over which there is a lot of
2 controversy.

3 MR. KEMPF: Can I ask a question of
4 Dennis?

5 MS. GARZA: Yes, sure.

6 MR. KEMPF: I suppose if we were to take
7 on six, defining market power, you know, where does
8 it carry you? In other words, that is at the
9 core--I agree that's at the core of a lot of stuff
10 that goes on, as is market definition, but, boy,
11 you know, that's usually a battle of experts and
12 it's slippery stuff. I mean, I essentially try to
13 avoid spending any time at it in any case because
14 for the defendants, it's usually a trick bag. So I
15 would always say to the judge it doesn't matter how
16 you define it as long as you keep the fundamental
17 market realities well in mind, and whether you say
18 we have--I'll take a real case--whether you
19 say we have 98 percent of the
20 inner-city bus market or two percent of the
21 inner-city travel market, it doesn't make any
22 difference if you look at all the factors in

1 involved in that, or energy versus petroleum or
2 energy versus coal or energy versus nuclear power.

3 There's a million ways you can look at
4 that, and back in the heyday of antitrust
5 enforcement, that was where the defendants always
6 lost on appeal. They always persuaded the judge of
7 a sensible market definition and got it yanked out
8 from under them on appeal, and so I would always
9 say to the judge, I don't care how you define it as
10 long as you get the facts and the forces right, and
11 so what I urge in my findings and will urge you
12 orally is to say I've studied it this way and I've
13 studied it that way and neither way does it make
14 any difference because of the factors are always
15 the same. That way, you don't get caught in it,
16 but if I end up having to define it or defining
17 market power, my gosh, that's an awful heavy thing
18 to take on.

19 MR. CARLTON: Well, I guess I agree in
20 part, having worked with you in some of those
21 cases, Don. I agree with that strategy. I think
22 it's important. I think there are at least two or

1 three things that are important. One is in some of
2 the cases where marginal cost is very low, I think
3 there is confusion what market power means and what
4 people are talking about, especially innovative
5 industries; but, second, even in cases where that
6 isn't an issue, let's just talk about what you
7 said. I think it is correct to say that market
8 definition is a first step and then let's look at
9 all the other facts. So the question is do we look
10 at what the other facts are and are there tests now
11 that are pretty routinely done that can illuminate
12 whether you have the right definition or the wrong
13 definition, and let's suppose you can do pretty
14 good tests as to what are the consequences if a new
15 firm enters or two new firms enter or one
16 firm exits and you know there is no effect on
17 price. Well, that answers the ultimate issue, and
18 I think it's important to stress that market
19 definition is not something that by itself answers
20 a question.

21 My sense is that as you move away from
22 the antitrust agencies into courts, into juries,

1 that point gets obscured, and I do think there is
2 confusion in how markets are defined, especially in
3 court cases, and we're already analyzing many of
4 these issues in the other memos.

5 MS. GARZA: All right. Jon Jacobson.

6 MR. JACOBSON: I want to try to address
7 most of the comments, and let me just start in
8 order of the questions. I was a no-vote on Issue
9 3, partially on the black hole theory, which I
10 completely endorse, partially because I think the
11 odds on getting a coherent consensus out of this
12 commission--and I like and enjoy working with
13 everyone here, but getting a consensus on these
14 issues, I think is going to be a struggle, in part
15 because the likelihood that the courts will take a
16 divided opinion by this commission on these issues
17 quite lightly, and, therefore, we will have done no
18 good at the end to have day. All of those
19 considerations add up to me to vote to decline to
20 consider these issues.

21 These issues to me are the most important
22 and interesting we have. So I'd love to spend time

1 looking at them. I just don't think we're going to
2 accomplish much good by doing so.

3 I do want to address Makan's point about
4 the bundling issue and LePage's, and I respect
5 that, but at the end of the day, the Division came
6 to largely the same--the Solicitor General came to
7 the same point of view which I have, which is let
8 the common law process work itself out, let's have
9 further cases, further factual situations so that
10 we can test our instincts to see if they're correct
11 and look at the what the law should be over a
12 longer view.

13 I do think if we look at bundling, it's
14 difficult not also to look at tying. It's
15 difficult not also to look at leveraging in the
16 attempt to monopolize sense. It's different not
17 also to look at whether the court in Trinko got
18 substantive Section 2 rights. So I think it's
19 difficult to look in isolation at the bundling
20 issue, and for that reason, although I find that
21 issue particularly interesting, I would just vote
22 no on the entirety of Issue 3.

1 On Issue 4, I respect the points of view
2 that have been expressed. I come out that we
3 should look at the issue, but it's not something
4 that, you know, if we were to say no on would upset
5 me unduly.

6 The buyer power, I also believe is a
7 close question. I've long had an academic interest
8 in monopsony issues and perhaps that colors my
9 view. I do think there are unique buyer power
10 issues that are affecting the economy today in ways
11 that they haven't before. I don't think the
12 economics profession has truly understood
13 monopsony, particularly where accompanied by the
14 economies of scope that we're seeing in some
15 companies in the economy today. I do think a study
16 of those issues could do some good. Again, this is
17 not one that I would jump up and down on if we were
18 to say no, however.

19 I would jump up and down, though, if we
20 were to say yes on market definition, because I
21 believe that is another true black hole. I don't
22 agree. I think it's true that we're going to

1 address market definition in everything you do,
2 because you can't talk about antitrust subjects
3 without talking about market definition, but that
4 doesn't mean we're going to analyze market
5 definition issues from the ground up, to take the
6 methodology, to take the question that we talked at
7 some length about in the working group, whether
8 there should be market definition at all, which
9 would require at least in some cases a statutory
10 change to Section 2 of the Sherman Act and Section
11 7 of the Clayton Act. So that is one that I feel
12 if we were going to get into it, it would occupy
13 virtually all of our time, and that's why I'm
14 comfortable myself with the working group
15 recommendation of no on Issue 6.

16 And that's my piece.

17 MS. GARZA: Any other comments before we
18 test our consensus?

19 Makan.

20 MR. DELRAHIM: Let me just quickly
21 respond on the LePage's issue, and the reason is--to
22 clarify the Solicitor General's position--was not so

1 much that we should let the common law test itself
2 out before there's a rule. It's the Supreme Court
3 is not yet ready to issue a rule, partly because
4 once the court speaks, you know, it requires a
5 constitutional amendment to overturn that thing,
6 and so we didn't have--

7 MS. VALENTINE: No.

8 MR. DELRAHIM: Almost.

9 MS. VALENTINE: No.

10 MR. DELRAHIM: But once there is that
11 pronouncement by the court, it's going to be very
12 difficult to overturn that through legislative
13 process. So it wasn't so much that it was let's
14 allow the academic study on this issue, let's have
15 some of the lower courts have some experience with
16 this. I think we are exactly one of those bodies
17 that could have an academic review of the issue and
18 add to the body of knowledge in this area, and I
19 think that's exactly what our mission is.

20 MR. KEMPF: And that's Item 3?

21 MR. DELRAHIM: That's just the subpart of
22 Item 3. That's only with respect to the bundling.

1 MR. KEMPF: I would actually welcome
2 further input from my fellow Commissioners on
3 three. Oddly enough, I earlier said I was inclined
4 to vote against it, but Jon's response in favor of
5 voting against it has much pushed me the other way.

6 [Laughter.]

7 MS. GARZA: Now, now, Don.

8 MR. KEMPF: He talked about the
9 importance of unanimity, and I don't--I think if we
10 can get unanimity on some things, for example
11 repeal of the Robinson-Patman Act, that would be a
12 swell thing. At the same time, as I look back on
13 the work of prior commissions, some of the most
14 enduring outcomes have been the product of the
15 dissents. If you look back at some of the
16 dissents, and some of those are the ones that at
17 the end of the day, the strength of their
18 intellectual power prevailed and they have become
19 what is currently prevailing antitrust law.

20 So I don't mind if we get a thorough
21 discussion of an important issue and we end up with
22 clear articulations of both view points. That

1 doesn't bother me, and as you were arguing, I said,
2 Well, gee, maybe that's something we ought to
3 embrace for reasons such as you said on the LePage's
4 case which is an area where we may not have
5 unanimity.

6 So if anybody else wants to weigh in on
7 it, I would welcome that, because I'm sitting on
8 the fence on it.

9 MS. GARZA: Sandy.

10 MR. LITVACK: I'm going to accept the
11 invitation and weigh in, because I've been on the
12 fence and back and forth on this very question.
13 The best argument against it that I've heard is the
14 one job John Warden articulated and you adopted
15 earlier about the black hole, and the best argument
16 for it, I think is the one John Shenefield
17 articulated in my mind.

18 When I come out--I mean, I think where
19 you come down to is, A, I share your view that it's
20 nice if we can reach unanimity, but it's not
21 essential, because if we were to do that, we would
22 come to the lowest common denominator on everything

1 and just pick those things everyone agrees on. I'm
2 not sure what we would have accomplished.

3 So I don't think that is the test. I
4 agree with you. I think what you come down to is
5 can we look at this and is it worth doing without
6 ending up in a black hole, and I guess where I come
7 out is, yes, I think we can and if we can, we
8 should. I think the we can is only a matter of
9 self-discipline. Obviously, you can put yourself
10 in a black hole, if we are so inclined, but I think
11 you can intellectually approach it and not let this
12 thing swallow you and yet add something.

13 So I'm almost thinking as I'm talking,
14 and I think I'm going to vote for it.

15 MS. GARZA: The other only question I
16 have is since we've been asked to prepare a report
17 to Congress and the President, which you could say
18 and suggest that what we would be doing is
19 recommending enforcement priorities or recommending
20 legislative change, where would we end up on this
21 issue? Would we be just putting a piece out there
22 that people could reference and cite to support or

1 undermine arguments? Where would it go?

2 MR. SHENEFIELD: May I quote from the
3 letter from Senator DeWine and Kohl, the chairman
4 of the Antitrust Subcommittee and the ranking
5 member?

6 MS. GARZA: Um-hum.

7 MR. SHENEFIELD: "We recommend you review
8 the current state of the monopolization law in the
9 wake of Trinko and consider whether you would
10 recommend any legislative changes. In addition,
11 the business community would benefit from a clear
12 articulation of the principles in this area."
13 Whether we ever get to that objective is something
14 that is unknowable, although one could be
15 skeptical, but if you can, if there is a chance, I
16 don't see how you could walk away from that rather
17 direct request.

18 MS. GARZA: Steve.

19 MR. CANNON: I agree with Sandy as well.
20 I mean, this question of it may take a lot of time,
21 but what's the corresponding value, and that's
22 where I--I mean, I'd hate to say let's not do

1 something because it's just too hard to do or we
2 think it will take too much time. In all of these,
3 you could spend an enormous amount of time on them.

4 So I'm with Sandy on this one.

5 MS. GARZA: Jon.

6 MR. YAROWSKY: I agree with Steve, and
7 also Chairman Sensenbrenner also indicated that the
8 Trinko decision was important. So I think we have
9 real interest on both sides of Hill, and our job is
10 to define it in a way that we can actually study it
11 and try to come out to a resolution.

12 MS. GARZA: Okay.

13 MS. VALENTINE: I'm still back with the
14 answer to Deb Garza's question, which is it is true
15 that we could say that the Justice Department or
16 the FTC should file amicus briefs and try to refine
17 the doctrine. It is true that we could say maybe
18 that Ortho is the better way of looking at LePage's
19 issues than LePage's, but what does that mean or
20 what kind of a recommendation is that at the end of
21 the day? I don't understand what we would be doing
22 here either other than the black hole.

1 MS. GARZA: Sandy.

2 MR. LITVACK: I'm probably just going to
3 repeat.

4 MR. CANNON: Are you changing your mind
5 again?

6 MR. LITVACK: No, no, no, not yet. I'm
7 with you now, Steve.

8 For me, at least, John answered the
9 question by reading what he did. I think the
10 answer, at least to me, is twofold. One, it may
11 well be that there are legislative remedies that
12 should be addressed; and, two, even if that is not
13 so or can't be identified, I don't think it is
14 irrelevant or trivial if we serve a benefit to the
15 business community by better defining or proposing
16 or articulating a better approach, and I think
17 often gains momentum.

18 I don't know how it translates itself at
19 the end of the day, but the prestige, the weight of
20 the Commission, if it have a view, may well lead
21 the way in some different direction, a better
22 direction. So that works for me anyway.

1 MS. GARZA: Any other comments?

2 MR. KEMPF: I'm going to change my vote
3 to a yes.

4 MS. GARZA: Let's get to voting. Let's
5 get to voting quickly, because, otherwise, we might
6 have a few changes.

7 On the Issue No. 1, can I by a show of
8 hands have the Commissioners indicate whether they
9 concur in the recommendation to study Issue No. 1?

10 [Commissioners vote by show of hands.]

11 MS. GARZA: Okay. On Issue No. 2, same
12 thing, can I have a show of hands to concur?

13 [Commissioners vote by show of hands.]

14 MS. GARZA: On Issue No. 3, can I have a
15 show of hands of those who concur in studying the
16 issue?

17 [Commissioners vote by show of hands.]

18 MS. GARZA: Okay. Issue No. 4, a showing
19 of hands for those Commissioners who agree with
20 studying the issue.

21 [Commissioners vote by show of hands.]

22 MR. HEIMERT: Six.

1 MR. KEMPF: Six means what, Madam
2 Chairman?

3 MS. GARZA: I was just wondering whether
4 I'm the tie-breaker. I don't know. We hadn't
5 discussed this.

6 MR. JACOBSON: I'll break the tie and
7 drop my positive vote in the interest of narrowing
8 the issues that we have to look at, the other
9 priorities.

10 MS. GARZA: So, Jon, are you saying that
11 you're withdrawing your vote to endorse the
12 recommendation?

13 MR. JACOBSON: We have to have some
14 resolution.

15 MS. GARZA: I think we've been going with
16 the majority rule. I shouldn't have been so silly
17 about it. So I think with six, it wasn't going to
18 succeed anyway.

19 MR. JACOBSON: Okay.

20 MS. GARZA: Can I have a show of hands on
21 the recommendation to study Issue 5, please?

22 [Commissioners vote by show of hands.]

1 MS. GARZA: Okay. Can I have a show of
2 hands on whether the Commissioners concur in the
3 recommendation not to study Section 6, Issue 6?

4 [Commissioners vote by show of hands.]

5 MR. JACOBSON: What's the count on that?

6 MR. HEIMERT: Seven nos.

7 MR. JACOBSON: What is a no?

8 MS. GARZA: Let me restate it to be
9 clear, just to be clear. The question is whether
10 the Commissioners concur in the recommendation not
11 to study Section 6, Issue 6.

12 [Commissioners vote by show of hands.]

13 MS. GARZA: All right. The Commissioners
14 who agree with the recommendation not to study
15 Issue 7, raise their hands.

16 [Commissioners vote by show of hands.]

17 MS. GARZA: Okay. Can I have a show of
18 concurrence with the recommendation not to study
19 Issue 8?

20 [Commissioners vote by show of hands.]

21 MS. GARZA: Okay. And, finally, a show
22 of hands for those who concur with the

1 recommendation not to study Issue 9?

2 [Commissioners vote by show of hands.]

3 MS. GARZA: All right.

4 MR. JACOBSON: So does that mean that the
5 issues for consideration are one, two, three?

6 MS. GARZA: Andrew, would you like to
7 address that?

8 MR. HEIMERT: That's my tally.

9 MS. VALENTINE: Yeah.

10 MR. KEMPF: That's mine.

11 MS. GARZA: All right. We're scheduled
12 to take a break now. We can do that, or I know
13 that some people would like to get out earlier.
14 Jon, do you think that--

15 MR. YAROWSKY: Yeah.

16 MS. GARZA: All right. Why don't we go
17 forward?

18 VIII. IMMUNITIES AND EXEMPTIONS WORKING GROUP

19 RECOMMENDATIONS

20 MR. YAROWSKY: With your indulgence, I
21 think we can do immunities and exemptions very
22 quickly given the nature of the discussions.

1 What I would like to do is make a quick
2 statement, and then I'm going to unilaterally turn
3 my discussion over to Mr. Kempf to talk about one
4 particular issue. We need to do a couple of
5 housekeeping matters, but they're important in this
6 area.

7 For anyone who has read the memorandum on
8 this working group, there was an omission. One of
9 the efforts we made in this group was to try to
10 once more dig into the archeology of the exemptions
11 and immunities, and there are quite a few, as you
12 see enumerated. One was left out, glaringly, and
13 that is the Shipping Act. So I'd like to just
14 suggest that was not the intent. We'll add it in,
15 not to put too fine a point on it one way or the
16 other. It's just part of the universe that we want
17 to talk about.

18 The second housekeeping item is that
19 there's kind of a misnomer in the Recommendation
20 One 1 when we say--and Debra and others have
21 brought this to our attention, and she is quite
22 right. We use the phrase "industry-specific

1 immunities and exemptions," and if you look at some
2 of the descriptive language and the listing that we
3 have, we're kind of pushing the boundaries of
4 industry specific. So if I can just for
5 communications purposes suggest we just drop that
6 terminology and just say, obviously, what we were
7 looking at were immunities and exemptions, both
8 statutory and case made.

9 MR. KEMPF: So you would just
10 re-articulate that without the industry specific?

11 MR. YAROWSKY: That's right.

12 MS. VALENTINE: Charitable donations,
13 export trading, filed rates, need-based education,
14 resident-matching programs, business acts, and
15 Webb-Pomerene all cover lots of industries.

16 MS. GARZA: I think take it there may be,
17 then, some immunities and exemptions that--let me
18 ask a question. If you strike industry specific,
19 and then if you look at the listing in the memo,
20 which would include the Shipping Act, are there any
21 other exemptions or immunities that we should
22 cover?

1 MR. JACOBSON: What is the
2 recommendation? That we--

3 MR. YAROWSKY: Yeah. The recommendation,
4 why don't we get to what the recommendation is?
5 The recommendation is that we study--the
6 methodology can come later--we study other
7 exemptions and immunities in the antitrust laws as
8 construed by statutes and case-made law.

9 MS. VALENTINE: Regardless of whether
10 they affect one industry or many.

11 MR. JACOBSON: Do we have a comprehensive
12 listing?

13 MR. YAROWSKY: Well, we've started. I
14 think we made a major step in doing that, Jonathan.
15 They are embedded deeply into the U.S. Code and
16 other places, and so we need to make that our first
17 order of business, but the presumption, at least
18 through the working group dialog, is that that's
19 our goal.

20 MR. JACOBSON: I'm not sure if this is
21 the appropriate time to ask the question or if you
22 want to finish your presentation, but at some

1 point, we need to address how we go about that.

2 MR. YAROWSKY: Yes. Right. As I said,
3 I'm just trying to do the housekeeping now so that
4 we can have that discussion.

5 Those are the two points. Now I want to
6 go to the recommendations. What we would like to
7 do in terms of studying the individual exemptions
8 and immunities, time may well not permit us to look
9 at every one individually. So, one, we have to
10 develop a methodology so we can discuss these.
11 Two, I think one of the goals in our discussions
12 was to come up with a methodology, if it's
13 possible, to evaluate and assess current immunities
14 and exemptions so that we can then maybe make some
15 proposals about how future immunities and
16 exemptions should be viewed and weighed as opposed
17 to just have them emanate from many different
18 quarters.

19 So one is just how do you deal with that
20 in a commission setting? Generically? Do you
21 single out certain exemptions, you know, as
22 examples? But the truth is if there's a commitment

1 to the general applicability of the antitrust laws,
2 if that's the basic commitment and presumption we
3 start with, then immunities and exemptions pose a
4 problem to that, and we need to then decide what
5 our view is on specific exemptions and just in
6 general. That's the first goal.

7 The second one would be to look at the
8 doctrinal exemptions, and the two that we've
9 identified are the State Action Doctrine and
10 the Noerr-Pennington Doctrine. Now, the FTC most
11 recently has completed its report on state action
12 and we certainly would want to read that carefully
13 and then go from there, and we understand that
14 another report may be forthcoming on the
15 Noerr-Pennington Doctrine.

16 Generally, what we've observed and many
17 others have observed is that these doctrines are
18 kind of incrementally expanding, and we need
19 to--you know, it's fairly clear to see that. I
20 think we all believe, at least on the working
21 group, that it would make a worthwhile effort for
22 us to analyze how it's expanded and whether some

1 recommendations should come forward about narrowing
2 that expansion or recommending that it be narrowed.

3 In addition, there is one other proposal
4 not here, but informed our debate, and that is
5 whether a recommendation should be made as to
6 time-limiting exemptions. A few of recent vintage
7 have had a time limitation. There was an exemption
8 in 2001, the need-based education test that was,
9 what, seven or eight years in duration and then it
10 would sunset. Most exemptions, at least statutory,
11 don't just have such sunset provision. One issue
12 that has come up in our interviews with current and
13 former antitrust officials, several have suggested
14 that we should follow the model that the DOJ
15 embraced with consent decrees, saying there is a
16 10-year sunset unless it's renewed.

17 Anyway, that's an issue that we hope we
18 will consider. It may have some utility in
19 advising the Congress about our views. Obviously,
20 if we would make such a recommendation, Congress
21 would have to act on that affirmatively, and that's
22 a major proposition there, but I think the idea is

1 at least worth considering as we move forward.

2 MR. KEMPF: With your change, you've
3 eliminated a lengthy, lengthy commentary by me, the
4 thing I cared most about today. So I welcome your
5 removal of industry specific, but let me make a
6 brief comment notwithstanding that.

7 It is my view that the antitrust laws
8 enjoy neither the respect nor the support among
9 the general population. They should, and while
10 there are many reasons for that--goofy antitrust
11 decisions, ill-considered prosecutions, etc. etc.--
12 probably the single largest one is the presence in
13 the economy of massive price-fixing everywhere
14 sponsored by the Government, either directly or
15 through regulation or through immunities and
16 exemptions, and one that--a proposal that sought to
17 carve out from any scrutiny a few people's pets was
18 ill-considered. Striking that, they're all on the
19 table now. We may, as you said, choose not to
20 consider one or another for a variety of reasons.

21 But under the current regime, to pick
22 one, if two people were in the same town in Iowa,

1 and one is a farmer and one is a farm implement
2 seller, and they both fix prices and do a good job
3 at it, one they may hold a big banquet for one and at
4 the end of the year put him on the cover of "Farm
5 Journal". The other one, they put him on the cover
6 of "Police Gazette" and cart him off the jail.

7 Disparate treatment like that does not
8 foster healthy respect or support antitrust laws,
9 and it's unfortunate. So I think that all of them
10 ought to be on the table, and I was concerned
11 earlier that we were looking at things like the
12 baseball exemption, an immunity confirmed by Justice
13 Holmes, I guess it was, that has never made any
14 sense, but baseball is so afraid of losing it, they
15 don't follow it, or the Webb-Pomerene Act which
16 impacts 10 people in Bulgaria. So my thought was,
17 you know, the stuff that impacts millions of people
18 in the United States and costs billions of dollars,
19 and not to look at those would be foolhardy.

20 Even if we all come to a conclusion,
21 there is no chance Congress is ever going to be
22 changing these things. They merely set the

1 framework for analyzing all the run-offs, and I
2 thought it was nutty not to look at everything
3 rather than just some.

4 So I'm very happy with your change, and I
5 don't really need to say anything beyond that
6 except one other thing, and as you say, if not
7 justified by the benefits they provide, what we got
8 in Footnote 59 of Socony was a final thing saying,
9 you know, we've looked at enough price-fixing cases
10 now and we're not going to listen to people
11 justifying stuff anymore, and I'm not sure that any
12 of these things can be justified or, stated
13 differently, I'm not sure they can't all be
14 justified. In other words, that's just an advocacy
15 thing of how you do, and what you're really doing
16 every time you make that decision, you're voting
17 against free and open competition.

18 So I'm not sure you need that baggage on
19 there, and you might just want to reduce it to
20 should antitrust immunities and exemptions be
21 eliminated, should some or all, something like
22 that.

1 That's all I had.

2 MS. GARZA: Jon.

3 MR. JACOBSON: I agree substantively with
4 Don. I say that with some trepidation, because I
5 seem to have a very positive affect on his
6 decision, but I am concerned about the process. If
7 we want to make a gesture by saying we think
8 immunities and exemptions are bad, I think we can
9 go about that quite easily. It won't be
10 difficult to do. The chances that anything will
11 come of it are zero.

12 If I we want to make a difference, and I
13 think this Commission can make a difference in a
14 number of respects, looking at the Robinson-Patman
15 Act, but particularly here, if we can really put
16 out a persuasive case based on the evidence adduced
17 at hearings and analysis informed by scholars and
18 industry witnesses why particular exemptions should
19 be abandoned, I think we will have accomplished a
20 great good, and I am concerned by putting
21 everything on the table that we inhibit our ability
22 to do that.

1 MS. GARZA: Jon.

2 MR. YAROWSKY: Yes. I'm just speaking as
3 the interim leader of this group. I mean, the
4 whole Commission will make decisions about how to
5 go to the next stage of having hearings or how we
6 conduct our deliberations on any of these subjects.
7 Here are just the thoughts about that: I think as
8 Don really eloquently said, this is a generic issue
9 about carve-aways and carve-outs from the antitrust
10 laws. We may actually develop some
11 recommendations, such as a sunset provision, that
12 we would actually get behind for all exemptions and
13 immunities. Whether followed or not, this may
14 actually be something we feel is warranted. We may
15 develop some other methodology that we could
16 subscribe to for all exemptions now, but we may not
17 have deliberations, explicit deliberations, on
18 every single one of the immunities and exemptions.
19 Instead, we may then focus on certain ones.

20 I think that's a decision that I'm not
21 prepared to make today except to say that
22 everything is on the table and we need to take this

1 to the next step. I think what you're rightly
2 raising is how efficiently to do the study to make
3 a difference, and I think we've reached the next
4 step, but I think our group just didn't want to
5 preclude choosing any one of the exemptions for
6 illustration or in-depth review.

7 MR. JACOBSON: I guess I'm uncomfortable
8 committing to study this issue without a firm
9 understanding from this group that we're going to
10 prioritize, because, otherwise, I just see it as a
11 gesture accomplishing nothing. I think you can
12 look through your list--and by the way, baseball is
13 left off it.

14 MS. VALENTINE: It's there. It's fourth
15 on page 4, major league baseball.

16 MS. GARZA: It's under "M" instead of
17 "B".

18 MR. JACOBSON: I am appropriately
19 chastised, but if we don't make a commitment to
20 prioritize, I'm reluctant to vote in favor of this
21 issue. I'd like to get a sense of the rest of the
22 Commissioners how they would like to go about this.

1 MS. GARZA: John Shenefield.

2 MR. SHENEFIELD: Let me see if I can help
3 you. What I envision, and I was part of the group
4 as well, is a product that is delivered in three
5 stages. First, an analytical frame work is
6 developed, which is hinted at here, but it has to
7 be far more nuanced and far more complex. A way
8 of filling in--secondly, a way of filling in the
9 unknowns in that framework, mostly through
10 economics, as Jim Miller did in connection with
11 surface transportation in the late seventies, as
12 Steve Breyer did in connection with airline
13 deregulation in the middle seventies, has to be
14 agreed on and then applying the analytical
15 framework and trying, but probably not being able
16 to succeed entirely, in filling in the unknowns,
17 picking three, five, seven, whatever the right
18 number is of exemptions and immunities that would
19 be possible candidates and recommending to
20 oversight committees in Congress or regulatory
21 agencies or whatever is appropriate that they take
22 the benefit of this commission's work and carry it

1 further.

2 Now, there seems to be general agreement
3 among a lot of different parties, including the
4 head of the Antitrust Division and our
5 congressional sponsors and the rest, that there are
6 three or four or five as to which they would like
7 our views. Shipping Act is one. Webb-Pomerene is
8 another. Export Trading Companies is another.
9 There may well be others.

10 MS. VALENTINE: Maybe McCarran these
11 days.

12 MR. SHENEFIELD: Maybe McCarran. And
13 there is no reason not to take that next step. My
14 only caution is that the amount of empirical work
15 that is involved in actually coming to harder
16 conclusions than can be arrived at in a couple
17 years, we probably can't do, but I think we can
18 kick this can down the road pretty far and make a
19 difference.

20 MS. GARZA: Okay.

21 MR. JACOBSON: I'm comfortable proceeding
22 on that basis.

1 MS. GARZA: Were there any other
2 comments?

3 MR. CANNON: This sounds a little like
4 the debate we may have in the regulated industries
5 presentation, that we talked about this very same
6 thing, which is trying to gather up some basic
7 principles for this analysis we have to do, knowing
8 that there are dozens of specific regulated
9 industries out there that maybe we would look to as
10 being, you know, helpful in that analysis.

11 So I think we've got to get started
12 somewhere, and John is absolutely right; you can't
13 do this forever. It would take a lot of time, but
14 I think it's a good start and I'd vote for it.

15 MS. GARZA: Okay. Bobby.

16 MR. BURCHFIELD: Each of these exemptions
17 and immunities is tailored to an activity or
18 industry as to which the people in that industry
19 think that they are somewhat special, and they may
20 not be. My inclination is to think in many
21 instances, they're probably not.

22 My question for you, John, and I'm sure

1 you've thought about this, is to what degree do you
2 entertain those people to come in and either speak
3 to us personally or submit written comments to put
4 on the table their arguments of why they are
5 special? It seems to me that in order for the
6 Commission's recommendation, however we come out on
7 this, to have legitimacy, we do need to provide a
8 forum for those unique interests or allegedly
9 unique interests to be heard quite apart from the
10 empirical work, and in view of that, how do we
11 manage and prioritize our time as to those
12 exemptions that we're going to listen on, because
13 there's a lot here, and the thing that struck me as
14 I read these memos--and as a late comer to the
15 Commission, I really do applaud the Commission,
16 each of you, for the work that you've done in
17 putting together these working memos, but the one
18 question that I had about this one in particular is
19 how you reach a point of legitimacy in your
20 analysis, covering so many different exemptions,
21 when every exemption has its defenders and they're
22 going to want to be heard.

1 MR. SHENEFIELD: And they absolutely
2 should be. I don't think there is any way that you
3 would want to avoid hearing the strongest possible
4 arguments in favor of the exemption or immunity and
5 the then dealing with them on the merits. I think
6 that was the turning point, for instance, in
7 airline deregulation. When it became perfectly
8 evident that the arguments in favor of CAB
9 regulation were essentially not very good at the
10 end of the day, but having said that, I don't think
11 we may get to that point, because this is a rather
12 long process. If we come out of this commission's
13 life with an intellectually respectable analytical
14 frame work and some sense of how you would go about
15 applying it to individual exemptions and
16 immunities, and then we have five or ten candidates
17 where we would like to apply it and we begin the
18 dialogue, that's very much like the Senate
19 Antitrust Subcommittee's work on airline
20 deregulation in 19-whatever it was, '75 and '6, I
21 think, which only began the process, and nothing
22 happened for several more years after that.

1 So I see us as enriching the intellectual
2 debate on the one hand, in effect calling certain
3 exemptions into question, holding them up for
4 public discussion, and leaving the discussion to
5 follow its natural course thereafter.

6 MS. GARZA: Jon.

7 MR. YAROWSKY: Yeah. This is the kind of
8 enterprise, at least in my experience on the Hill,
9 and we have Makan and we have Steve Cannon and
10 others who deal with the Hill quite a bit. This is
11 not what happens. What happens is there is other
12 very deep consideration of the issues, empirical
13 realities, the economies surrounding certain
14 interests, and those compete rightfully in a
15 political process for attention. There is nothing
16 wrong with that. No one has a Certificate of election
17 because they're an antitrust purist. I mean,
18 that's their job, is to bring together a lot of
19 different factors.

20 That's not our job. We're charged with a
21 different mission, and I think it might be well
22 appreciated--I'm just guessing, but I think it

1 would be well appreciated, given that we are
2 insulated now in a different way from those types
3 of pressures, to try to develop an analytical
4 framework that might be of use. If we can't do it,
5 I think we should be honest with ourselves after we
6 make a real wholehearted attempt, but if we can do
7 that, even if we don't succeed in going through 10,
8 15, examples, I think that frame work might have a
9 life beyond what we do and might then be able to be
10 used, because I think it's just a hard enterprise
11 to do that up there on the spur on the moment when
12 something happens.

13 MR. SHENEFIELD: I will observe that in
14 the letter, again, from the DeWine and Kohl, that
15 is their first enumerated priority.

16 MR. YAROWSKY: And now joined by the head
17 of the Antitrust Division and many, many others.

18 MS. GARZA: Steve.

19 MR. CANNON: I notice the Local
20 Government Antitrust Act did not make your--

21 MR. YAROWSKY: Yes. Well, of course it
22 falls from Parker v. Brown. Isn't that what the

1 legislative report said? Yes, we actually omitted
2 the Local Government Antitrust Act that Mr. Cannon
3 spearheaded.

4 MR. CANNON: That's kind of an
5 overstatement.

6 MS. GARZA: Any other discussion on issue
7 one or two or three before we test a consensus?

8 No. All right. Then can I ask by a show
9 of hands which Commissioners agree with the
10 recommendation of the working group to study issue
11 one?

12 [Commissioners vote by show of hands.]

13 MS. GARZA: Okay. Can I ask for a show
14 of hands which Commissioners agree with the
15 recommendation to study Issue 2?

16 [Commissioners vote by show of hands.]

17 MS. GARZA: Okay. And can I ask for a
18 show of hands of those Commissioners that agree
19 with the recommendation to study Issue 3?

20 [Commissioners vote by show of hands.]

21 MS. GARZA: Okay. Very good.

22 Well, what we're do now is take a

1 ten-minute break until 3:10, and then when we come
2 back, we'll going into regulated industries and
3 then I think at least begin on the general
4 discussion.

5 [Recess.]

6 MS. GARZA: We'll re-begin the meeting,
7 and we have now the Regulated Industries Working
8 Group recommendations to review. Steve Cannon, you
9 were the head of that group, so can we go ahead?

10 IX. REGULATED INDUSTRIES WORKING GROUP

11 RECOMMENDATIONS

12 MR. CANNON: Sure. Thanks. In this
13 working group as well, we were, I think, in a very
14 serious black hole avoidance mode, understanding
15 the enormity of this, if we tried to go industry by
16 industry and do some comprehensive analysis. So
17 the idea that we obviously came up with is, as
18 reflected in our recommendations that are here, is
19 to try to--obviously, we had a couple we thought
20 should be key considerations or key issues that
21 Commissioners should study. Obviously, knowing and
22 understanding that, whether there's two or three or

1 five or ten specific examples of regulated
2 industries that would be appropriate to these
3 various issues is how we would go about it.

4 So, obviously, we can go through these
5 questions pretty quickly, and I think it might be a
6 fairly quick go-through of the issues that are not
7 recommended for study as well.

8 But the first question, obviously, is a
9 very large question. It impacts a lot of
10 industries out there and not an insignificant
11 amount of the overall economy, about this division
12 of responsibility between enforcement of
13 competition policy or antitrust laws between the
14 antitrust agencies and then the other regulatory
15 agencies; and then there really are two basic
16 models here, either the antitrust agencies have no
17 authority in a situation like at the Surface
18 Transportation Board with railway mergers, etc., or
19 the agencies share authority, whether it's
20 something like telecommunications, banking, and
21 other sorts of issues.

22 So we thought this was a very important

1 principle, a good question to answer, and obviously
2 presented that to the task force. The bottom line
3 for us in terms of raising this question is whether
4 or not it really is in terms of allocation of
5 resources, etc., more sensible to have antitrust
6 authority in the antitrust agencies versus
7 somewhere else. I'm sure everyone around the table
8 has had some experience or another where you've
9 thought, gee, this was a good idea to have it
10 somewhere else or it was a bad idea to have it
11 somewhere else.

12 So that was the idea behind that, behind
13 Question 1 for analysis.

14 The second question was how should the
15 presence or absence of antitrust savings clauses in
16 regulatory legislation be interpreted. Obviously,
17 it revolves a lot around the Trinko decision, you
18 know, and we thought that, obviously, in light of
19 Trinko, that it was good to make sure that we
20 could--or contemplate clarifying the appropriate
21 interpretation of savings clauses and then,
22 obviously, kind of the other side of that, which is

1 the scope of the implied immunity doctrine, you
2 know, where there is no savings clause.

3 I would note, I believe this was an issue
4 of some note and consequence to Chairman
5 Sensenbrenner in his comments to the Commission.

6 And the third and final issue for study
7 was whether or not Congress and regulatory
8 agencies, should they set specific
9 industry-specific standards for a particular
10 antitrust violations that may conflict with
11 general standards for the same violations, and
12 I know in the materials and memos that were sent
13 out, there was a specific reference there, in fact,
14 to the time standards, etc., in the banking
15 industry.

16 So those were the three that we, after
17 culling through a lot of actually very good
18 suggestions, but some of which we heard about how
19 much time, effort it would take versus the value
20 that may be received, we came up with those three.

21 Do you want me to go to the ones not
22 recommended or any discussion on those?

1 MS. GARZA: Do you want to invite
2 discussion on those?

3 Sandy.

4 MR. LITVACK: I have a question, I guess
5 specifically with regard to No. 2. I guess what
6 occurs to me, and I don't pretend to really know
7 this, but aren't many of the so-called savings
8 clauses worded very differently? Aren't there
9 legislative histories relating to them, and
10 wouldn't this be a very specific--in other words,
11 if you're trying to say what does it mean, the
12 answer is, Well, tell me what it says, tell me the
13 legislative history, and I'll tell you the answer,
14 at least what I think the answer is.

15 MR. CANNON: Sure.

16 MR. LITVAK: What would we possibly do?

17 MR. CANNON: Well, I think other
18 members--Jon, do you want to chime in on that?

19 MR. YAROWSKY: Sandy, I think the key
20 question that we discussed in this working group
21 was given the tremendous number of waves that have
22 come out of the Trinko decision, should we try to

1 at least make a statutory recommendation, not be a
2 presumptuous, but attempt to make a statutory
3 recommendation to Congress that in passing
4 regulatory statutes, that they explicitly consider
5 what their intention is about the antitrust laws,
6 not tell them how to draft it. That's going to be
7 up to them, and the courts, as you say, are
8 going to have to see if they did it or not, if the
9 intent was really actualized, but given all the
10 chaos that has emerged since that decision--and it
11 may be a short consideration, but this may be an
12 area we could succinctly give some direction on.

13 MR. CANNON: If we're going to do it, now
14 would be the time.

15 MR. LITVACK: Not to be flip, but are we
16 saying anything other than, You know, when you do
17 these things, think about it? Isn't that what
18 we're saying; when you write an antitrust savings
19 clause, think about it?

20 MR. CANNON: That would take 10 pages to
21 write, Sandy.

22 MR. LITVACK: It would just seem to me

1 that this is so narrow, and if we are not
2 proposing--and I understand Jonathan is saying we
3 are not and we should not--specific savings clause
4 language that we think would clearly guard against
5 any misinterpretation by the courts, then I, for
6 one, would just have a question in my mind as to
7 whether this is worthy of our time.

8 MR. CANNON: I mean, I don't think we
9 would preclude that, but the Commission may
10 actually do exactly that in terms of recommending
11 that.

12 MS. GARZA: The memo indicates that
13 Chairman Sensenbrenner had recommended this for
14 study. Can somebody refresh my memory; exactly how
15 had the chairman put the issue? What was the
16 specific issue that he had requested us to study?
17 Does someone have that here?

18 MR. CANNON: I don't have it with. Do
19 you, Jon?

20 MR. DELRAHIM: He had a hearing on the
21 Trinko case, and he specifically dealt with--he was
22 active in putting in the savings clause in there,

1 and he thought that Trinko came out the wrong way,
2 and he had a whole hearing thinking that the
3 savings clause in that statute should have
4 preserved antitrust enforcement and allowed the
5 claim to go forward.

6 MS. GARZA: Jon Jacobson, do you have the
7 letter there? Can you read it?

8 MR. JACOBSON: Actually, I'm reading from
9 the July 15th transcript where he attempted to
10 articulate this.

11 MS. GARZA: Okay.

12 MR. JACOBSON: He said:

13 "Fifth, the continued application of the
14 antitrust laws and regulated industries is a
15 fertile for the Commission's inquiry. Over the
16 last several years, the courts have sometimes
17 ignored explicit antitrust savings clauses in
18 legislation enacted by Congress, principally the
19 Telecom Act of 1996. The antitrust laws provide an
20 appropriate competitive bulwark across a range of
21 regulated and non-regulated industries, and their
22 dilution or circumvention by judicial fiat is a

1 troubling development.

2 In a similar vein, competition advocacy
3 by the Antitrust Division and the FTC during
4 regulatory proceedings undertaken by other Federal
5 agencies such as the FCC is a productive area of
6 inquiry."

7 MS. GARZA: Okay.

8 MR. JACOBSON: So if I could comment, I
9 understood the intent of this to go well beyond the
10 presence or absence of savings clauses and to go to
11 the heart of implied immunity doctrine generally,
12 and you and I had a conversation this morning where
13 it was my take-away from that was the intent
14 of the recommendation, and I'd be reluctant for the
15 reasons that Sandy--first of all, I'm reluctant to
16 talk at all, because I dissuade Don all the time,
17 but I think Sandy's concern about this being too
18 narrow is precisely mine, but I'm very comfortable
19 looking at implied immunity generally, more than
20 comfortable. I think we have to, and one aspect of
21 that, candidly a minor aspect of it, is going to be
22 the interpretation of savings clauses.

1 MR. YAROWSKY: I think that's right. I
2 think this is a narrow formulation, but it takes
3 you into implied immunity. At least in this
4 working group and in the context of regulated
5 industries, we have complex schemes, regulatory
6 schemes, created by Congress. Those regulatory
7 schemes often come out of committees that don't
8 have jurisdiction over the antitrust laws. There
9 is never a thought about the antitrust laws. The
10 question is are the antitrust laws a constant if
11 someone doesn't invoke them.

12 Now, the small question, though it's not
13 monumentally important in terms of the application
14 of the antitrust laws, is how do you make sure that
15 that happens, and that's a drafting issue. I think
16 Sandy is right; there is only a limited amount we
17 can say about drafting, but I think the intent of
18 this is to take us into the realm of implied
19 immunity, but through the context of regulated
20 industries where this comes up all the time.

21 MS. GARZA: So would the concept be that
22 we would do something like what John Shenefield had

1 outlined in respect to the immunities and
2 exemptions proposal; is that how you would be
3 approaching it?

4 MR. YAROWSKY: Yes. I think we would
5 develop a framework. First, we'd have to look at
6 implied immunities, generally the state of the law,
7 and then some of that is done in the immunity and
8 exemptions sections or some interchange, but then
9 the question is, I mean that we need to pose, is
10 are the antitrust laws a constant that can only be
11 taken away explicitly. You know, are they present
12 unless explicitly taken away or molded into a new
13 scheme? And then I think there are pros and cons
14 about that proposition.

15 MR. JACOBSON: From Georgia Pacific
16 Railroad in 1940 through January of 2004, I think
17 it was the universal understanding that the
18 antitrust laws would be--an implied immunity would
19 be created only on the basis of a plain repugnancy
20 between the antitrust laws and the regulatory
21 regime. I believe that Trinko decision has cast
22 some confusion into that area of the law. Implied

1 immunity is not briefed as such in the Trinko case.
2 The briefing focused on the text of the telecom
3 act, the interpretation of the savings clause,
4 standing in light of that. I believe the Supreme
5 Court may, and there are a number of
6 interpretations of the decision, have veered
7 inadvertently in a direction that at least some
8 people are going to argue repeal 64 years worth of
9 good law.

10 Because it's the Supreme Court and
11 because the only fix for the Supreme Court is
12 legislative or at least a recommendation from a
13 commission to the Supreme Court to rethink what
14 you've done, I think among the most important
15 things we could do is address the potential harm
16 that Trinko may have done to this well-established
17 and extremely important doctrine of antitrust law.

18 MS. GARZA: Sandy.

19 MR. LITVAK: I think you run the risk of
20 overreacting to one Supreme Court decision. Apart
21 from legislation, another way the Supreme Court
22 reams itself in is in further decisions. Trinko,

1 and you're going to have--if you haven't
2 already--I'm sure you have--lots of people writing
3 on Trinko, what was wrong with Trinko, what they
4 didn't consider, what they should have considered,
5 etc.

6 When we render a report, if we do, three
7 years from now, I'm not sure what--at least I don't
8 have any confidence right now that there is going
9 to be any particular value to what we may have done
10 with respect to a single case. This isn't Parker
11 v. Brown which has been around for a long time and
12 now you're trying to say how has it evolved and
13 where are we. This is a one-year old decision.

14 I'm leery given all the rest we have--I
15 mean, I'm perfectly happy to hear more, but I'm
16 just expressing a view which says I am leery of
17 really devoting a lot of energy to this at this
18 juncture given the other issues that we are and the
19 need, which everyone recognizes, to prioritize
20 these things.

21 MS. GARZA: John Warden.

22 MR. WARDEN: I have a question for Sandy,

1 which is how do you feel about the broader
2 statement of this issue, that as an examination of
3 implied immunity doctrine and case law in general?

4 MR. SHENEFIELD: Including the savings
5 clause?

6 MR. WARDEN: Well, sure, but that may be
7 the tail rather than the dog.

8 MR. LITVACK: Well, when I heard it, I
9 guess to answer your question, John, which a
10 witness never does, I'll answer it with a question,
11 which is state the issue for me more, what is the
12 issue. In other words, I read this is and I have
13 the concerns that I've articulated. I hear Jon
14 Jacobson frame it slightly--put it as a broad
15 question, which sounds--John Warden says it sounds
16 right, but I guess I'd come back and say what is it
17 we're studying, what is the question.

18 MR. SHENEFIELD: Let me try, may I?

19 MS. GARZA: Um-hum.

20 MR. SHENEFIELD: Given the existence of
21 Trinko and whatever progeny have been decided by
22 the time we actually get to this and given the

1 existence of the history of the implied immunity
2 doctrine and particularly cases that have, in fact,
3 been criticized, such as Gordon and NASD and the
4 like, what is the appropriate way to look at the
5 doctrine of implied immunity or how best to apply
6 the doctrine of implied immunity, including the
7 savings clause jurisprudence in the current context
8 or something of that sort.

9 MR. JACOBSON: I think that's well
10 articulated and extremely important.

11 MR. SHENEFIELD: It's a hugely important
12 subject matter. There's no doubt about that.

13 MR. CANNON: Can you say it again, John,
14 is the question.

15 MR. SHENEFIELD: Given all the things
16 that I mentioned--

17 MS. GARZA: We have a court reporter. If
18 you're interested, we can read it back.

19 MR. LITVACK: John, I think I understood
20 everything up to the last part. How, in your view
21 as a generic matter, not specific, how does the
22 savings clause fit into that, because as I said

1 when I started this, savings clauses are worded
2 differently. They come in all sizes and varieties.
3 They have different legislative history behind
4 them. So how would that, in your view look as you
5 look at it, tie into the general question?

6 MR. SHENEFIELD: I can't give you an
7 encyclopedic answer, because as you say, there are
8 many different kinds of savings clauses with
9 different legislative histories, but it seems
10 probable to me, just thinking about it a priori,
11 that there are kinds of savings clauses--they don't
12 make it up every time they start on a new savings
13 clause. So they go back and look, Congress goes
14 back and looks, at prior examples.

15 My guess is there are kinds of savings
16 clauses designed to address specific kinds of
17 problems and specific kinds of industries. It may
18 well be that some are better than others. Some of
19 are ineffective. It may well be that Trinko only
20 deals with a certain kind and not others. So I'm
21 not sure, but it's got to be part of that problem
22 or that examination, I would think.

1 MR. JACOBSON: I understand the request
2 of Congressman Sensenbrenner to perhaps have been
3 pushed by the Telecom Act and its treatment in
4 Trinko, but the question that he posed was the
5 broad one that you articulated, and I gave Steve
6 some language earlier that might be substituted
7 here to capture what I think is the intent of the
8 discussion.

9 MS. GARZA: I guess from my perspective,
10 I might be more inclined to approach it the broader
11 way, which is sort of on the question of implied
12 immunities than to do something which I think that
13 Congress can do. If they decide they don't like
14 the Supreme Court's decision, they can always
15 clarify what they meant by savings clause. So if
16 it were only the savings clause question, I think I
17 would be inclined to vote against recommending the
18 issue. It's more difficult for me and you're
19 pretty persuasive on the issue of the implied
20 immunity.

21 MS. VALENTINE: So is the issue that
22 we're voting on how should the doctrine of implied

1 immunity be applied to best further the goals of
2 the antitrust laws?

3 MS. GARZA: I think the issue is the
4 tension between the desire to implied immunity in
5 certain regulated industries versus the general
6 good of having antitrust law applied across the
7 board, I think is what the issue is.

8 MR. JACOBSON: Can I read in an effort at
9 an articulation, which I think should not be
10 controversial?

11 "What is the appropriate standard for
12 determining the extent to which the antitrust laws
13 apply to regulated industry where the regulatory
14 structure contains no specific antitrust exemption
15 and/or contains a specific antitrust savings clause?"

16 MR. WARDEN: That's fine.

17 MS. GARZA: Okay. Where is that? What
18 are you reading from?

19 MR. JACOBSON: I wrote it this morning.

20 MS. GARZA: Oh. You wrote it. Okay.

21 MS. VALENTINE: That sound good.

22 MR. GARZA: Does the working group

1 believe that accurately--

2 MEMBERS IN UNISON: Yes.

3 MS. GARZA: Okay. Any other discussion
4 people wanted to have on any of the other issues?

5 MR. DELRAHIM: Yeah.

6 MR. JACOBSON: I don't think--I'm sorry,
7 Makan.

8 MR. DELRAHIM: No. I'm sorry.

9 MR. JACOBSON: I don't understand Issue
10 3? Could you elaborate a little more on it? I'm
11 just not sure I understand what we're getting at.

12 MR. CANNON: Jon.

13 MR. YAROWSKY: I think I can jump in and
14 give an example. Regulatory bodies create their
15 own regulations. They have their own terms of art.
16 Occasionally, regulatory bodies start creating,
17 quote-unquote, antitrust violations in the context
18 of the industry they supervise. Sometimes those
19 regulations and those violations are not--there's
20 not a concordance between what they have defined as
21 price-fixing, tying things like that to be, with
22 what is generally applicable to all other

1 industries.

2 This has come up, as Steve I think
3 alluded to, in the banking area where I think the
4 Federal Reserve in recent years, three or four
5 years ago, created an illegal tying test that is
6 much different than--even though the law of tying
7 is sometimes challenging--different than the law of
8 tying as we know it in antitrust law.

9 MR. JACOBSON: Okay. Thank you.

10 MR. YAROWSKY: Again, I don't think this
11 is going to be a monumental effort, but to identify
12 those areas and then to maybe come up with some
13 recommendation.

14 MR. CANNON: I think there are more than
15 a few examples of that.

16 MS. GARZA: I was going to ask that. Are
17 there other examples?

18 MR. CANNON: I think there are.

19 MS. GARZA: Any that you can identify?

20 MS. VALENTINE: What if they called it
21 something else?

22 MR. JACOBSON: I think bank mergers might

1 be one. That involves the Justice Department also,
2 but I know they always used to, at least
3 technically, double the HHI delta in analyzing
4 in bank mergers and local mergers.

5 MS. VALENTINE: They used to do it for
6 firms even when others were doing it.

7 MS. GARZA: But is that different from
8 Issue No. 1, which is the question of whether or
9 not we should have of antitrust agencies looking at
10 mergers?

11 MR. CANNON: No. 1 is obviously division
12 of authority or oversight of persons, the substance
13 we're talking about, which is Issue 3.

14 MS. GARZA: Any other questions or
15 comments on this?

16 Makan?

17 MR. DELRAHIM: The only comment on the
18 implied immunity is the area on banking. The
19 Second Circuit has gone much broader than the
20 repugnancy test that we talked about, and Trinko
21 doesn't bother more necessarily as such; however,
22 it does touch on that. But in the area of

1 securities, they have practically taken antitrust
2 completely out.

3 Now, if Congress intends to do that, it
4 should explicitly say so; however, the language in
5 the case law on the derivatives and the IPO cases
6 have completely taken antitrust out, and I don't
7 know if that's Congress's intent. As we study this
8 issue, I don't think we should lose sight of some
9 of those other areas outside of the telecom area.

10 MS. GARZA: Anything else? Anyone else?

11 All right. Then let's move to testing
12 our consensus.

13 On Issue No. 1, can I have a show of
14 hands as to those Commissioners who agree with the
15 recommendation to study the issue?

16 [Commissioners vote by show of hands.]

17 MS. GARZA: Issue No. 2, referring to
18 what Hiram passed out, which is the re-articulation
19 of that issue by Jon Jacobson, can I have a show of
20 hands for support for that recommendation?

21 [Commissioners vote by show of hands.]

22 MS. GARZA: Okay. Issue No. 3, can I

1 have a show of hands for those who support that
2 recommendation?

3 [Commissioners vote by show of hands.]

4 MS. GARZA: Issue No. 4, by show of
5 hands, Commissioners who endorse the recommendation
6 not to study the issue.

7 [Commissioners vote by show of hands.]

8 MS. GARZA: Same question with respect to
9 Issue No. 5, endorse the recommendation not to
10 study the issue.

11 [Commissioners vote by show of hands.]

12 MS. GARZA: Recommendation 6, raise your
13 hand if you endorse the recommendation not to study
14 the issue.

15 [Commissioners vote by show of hands.]

16 MS. GARZA: And, finally, with respect to
17 Issue 7, can I have a show of hands of those who
18 agree with the recommendation not to study?

19 [Commissioners vote by show of hands.]

20 MS. GARZA: The staff is going to print
21 out for Commissioners basically a schedule so we
22 can see what it was that we formed our consensus on

1 so that we can have that for our discussion this
2 afternoon. So I would like to take--how much time
3 do you need?

4 MR. HEIMERT: Why don't we say 15
5 minutes?

6 MS. GARZA: Only 15?

7 MR. HEIMERT: Yes.

8 MS. GARZA: All right. A 15-minute
9 break. So we'll come back at five to four.

10 MR. KEMPF: Madam Chairman?

11 MS. GARZA: Yes.

12 MR. KEMPF: I have, as I mentioned to you
13 earlier, a conflicting meeting that's supposed to
14 start at four o'clock at the Securities and
15 Exchange Commission.

16 MS. GARZA: Okay.

17 MR. KEMPF: And I'm wondering in light of
18 that, whether before we take a break, if I could
19 make a couple comments.

20 MS. GARZA: Sure. Please do.

21 MR. KEMPF: And then I'll look forward to
22 reading the transcript of the other discussions

1 later.

2 We have done, I think, a thorough and
3 thoughtful job of examining the work of the various
4 working groups and, for those of us who were on
5 some of the working groups, re-examining our own
6 work, and have decided what we decided today. We
7 also have a group of letters, many from interested
8 people, others from enforcers and the like,
9 academia, industry, and as I looked at those, I
10 think we've addressed most all of them during the
11 course of our discussions, but not all of them, and
12 there were some things in Assistant Attorney
13 General Pate's letter that we didn't cover or, for
14 example, in one of them, we covered it narrower. I
15 agreed with the observation that his first comment,
16 while it encompasses the effectiveness of merger
17 law, is broader and asks us to consider antitrust
18 impacts more broadly. I think that's a healthy
19 suggestion. I thoroughly endorse it and hope we
20 will add it to our agenda.

21 I would take his other comments and would
22 adopt them to the extent they marginally go beyond

1 what we have adopted, although most of them were
2 picked up by us today. And the other comment,
3 there was one person who had said you didn't even
4 mention six of my seven comments or something like
5 that. I've looked at those again carefully and
6 would not adopt any of those.

7 MS. GARZA: John, what was it that
8 you--what would you adopt?

9 MR. KEMPF: I would not adopt
10 recommendations--Lundgren, I think is the name.

11 MS. VALENTINE: Lundgren.

12 MS. GARZA: Okay.

13 MR. KEMPF: I've looked at that. There
14 was content in various of those that I'm sure we'll
15 get into, in fact, in maybe much of that we
16 will specifically get into, but in terms of adding
17 the items to the agenda in the way he suggests
18 them, I would not add any of those.

19 Finally, we received a thoughtful piece
20 and a book by--it's a colleague of Michael Porter's
21 from Ohio. I don't remember his name.

22 MS. VALENTINE: Charles Weller.

1 MR. KEMPF: Yes, Mr. Weller. Again, I
2 would not add anything to our agenda from that,
3 although there is much substance that I would want
4 to consider. I disagree with most of the thoughts
5 he has in there, but I haven't had a chance to
6 really digest them well and to think about them,
7 and I would want an opportunity to do that; but in
8 terms of adding anything to agenda, I would not
9 pick up on that.

10 So where I think I really come down is if
11 there is a vote of any of those, you can count me
12 as a vote no, but if there is a vote on anything
13 from Assistant Attorney General Pate, you should
14 count me as a yes, and specifically I would
15 enthusiastically embrace his first suggestion. By
16 that, I don't mean that we as a committee would
17 necessarily undertake the kind of review he has.
18 We may fund it, we may seek to have others do it,
19 or it may be something that comes out of this
20 commission's work as something that would go on
21 beyond our life. As he himself says, this could
22 take several years. But I think it's something

1 that I would echo with the comments Dennis made
2 earlier, that it's something that I think is
3 decidedly worthwhile. How we should go about doing
4 certain things when they may not be worth doing at
5 all, however we do that them, is sort of something
6 that may have the cart before the horse. So I
7 would endorse specifically that proposal.

8 And that's all I have to say, and I
9 appreciate your accommodating me so I can go to
10 this other meeting.

11 MS. GARZA: Thank you. So we'll break
12 for now, then, and try to be back here about five
13 to four. Thank you.

14 [Recess.]

15 X. GENERAL DISCUSSION OF ISSUES

16 MS. GARZA: All right. I propose for the
17 rest of the afternoon we follow the following
18 procedure: First, we'll have Andrew explain what
19 it is he's passed out, what the staff has passed
20 out. The Commissioners should have two documents.
21 The aim of this is to sort of consolidate our
22 achievements today, basically review where we are

1 after today's discussions, and Andrew will explain
2 how these documents are set up and in what format.

3 I'd also like in that context to have a
4 brief discussion and I have a proposal to make in
5 respect to the recommendation in Hew Pate's letter
6 that we've discussed earlier today.

7 Then, finally, we'd like to discuss,
8 basically, the next phase of our work, where we go
9 with this tentative consensus list of issues.

10 So with that, I will first ask Andrew to
11 basically help us recap where we are and explain
12 these documents to us.

13 MR. HEIMERT: Thanks. There are two
14 documents that we've prepared. We filled them in
15 as we went along. One document, which has two
16 pages to it, lists each of the issues in the
17 alphabetical order by group and then issue by issue
18 number with what the consensus resolution was,
19 whether to study, yes, no, or defer. There are
20 some notes for a few of the issues. There were
21 clarifications. We couldn't fit them, obviously,
22 in this box, but we, obviously, have the court

1 reporter and our own notes as to how they were
2 clarified or modified if it's not clear here.

3 The second document, which is three
4 pages, has sorted the issues into the yes, defer,
5 and no categories. I think that's relatively
6 self-explanatory. There are 25 issues in the
7 yes category of which two of were really, through
8 discussions combined, which I think it was Mergers
9 No. 3 and 7, if I'm correct--excuse me--Civil
10 Procedures 3 and 7. I stand corrected. And I
11 think it would be useful--

12 MS. VALENTINE: Don't you think you've
13 also combined Merger 6 and 7, and in 7, if I recall
14 correctly, there were recommendations also about
15 doing vertical and conglomerate guidelines, and I
16 don't believe anybody voted for that.

17 MR. HEIMERT: That's part of the purpose
18 of what we'll do now, which is to go through and
19 make sure that this is, in fact, what we agreed to
20 do, and if there is a clarification such as Debra's
21 and any others that people would like to make, we
22 can take those steps now.

1 MS. GARZA: Well, why don't you read
2 that.

3 MR. HEIMERT: Okay. The first
4 clarification Commissioner Valentine noted, that
5 Merger Issue No. 7 is broader than simply looking
6 at the--I'll have to pull out the issue. Excuse
7 me. We're on the Mergers Group.

8 MS. VALENTINE: It says: "Do horizontal
9 merger guidelines accurately reflect how the
10 Federal agencies analyze mergers?" And I believe
11 when we were talking about Issue No. 6, there were
12 certain members among us who wanted to include that
13 in six. It also includes within it should the
14 agencies provide guidance in regard to how they
15 analyzed non-horizontal, that is vertical and
16 conglomerate mergers. I was not aware that anyone
17 voted for doing vertical and conglomerate issues.

18 MS. GARZA: It's really Mergers 7(a).

19 MR. HEIMERT: I think that's correct.
20 It's really Merger 6, and then in the process of
21 doing six, Part A of Question 7 likely would be
22 addressed at least in passing. That is my

1 understanding.

2 MS. VALENTINE: That is my understanding
3 of the vote as well, yes.

4 MR. HEIMERT: Do any other Commissioners
5 have a different understanding or recollection?

6 Seven itself is a no consensus as an
7 issue standing alone.

8 MS. VALENTINE: Right.

9 MS. GARZA: Then you have, on the second
10 page, the deferred.

11 MR. HEIMERT: Before we go to the
12 deferred, were there any other issues on the yes
13 issues as to ones that people thought were, in
14 fact, yeses or otherwise?

15 Okay. Let's go to the deferred page,
16 which has, as you see, only four issues. On the
17 Civil Procedure Issue 6 and Criminal Procedure
18 Issue 7, both of those were--the idea was to gather
19 more information by going to the heads of the FTC
20 and the Department of Justice Antitrust Division to
21 gather further information about what might, if
22 anything, be done and then at that point make a

1 decision what more this Commission might do.

2 On Criminal Procedure Issue 2, which is
3 the sentencing guidelines, the question is deferred
4 for now to see what other responses from Congress
5 or the Sentencing Commission or the courts might
6 arise, and then this Commission could take
7 additional steps to provide information on
8 antitrust sentencing.

9 MR. JACOBSON: I thought we had a--I had
10 a clear understanding--let me put it this way--that
11 this was in a different category in that we were
12 not deferring a decision whether to consider it.
13 We were making a decision to consider it. We were
14 deferring the actual consideration of it until the
15 end of our process to take into account these
16 additional new learnings.

17 With regard to these other issues, I
18 think we were making a decision to defer whether to
19 address it at all in our report.

20 MR. SHENEFIELD: In either case, they're
21 being deferred. For whatever reason, they're not
22 being done first.

1 MR. JACOBSON: I just think it's in a
2 different category.

3 MR. SHENEFIELD: Well, they are action
4 items, if I can. For example, the wonderful
5 emissaries of Litvak and Shenefield are going to
6 gather information. As they gather information,
7 and bring it back, we may want to decide to do
8 more, or that may be sufficient because we'll have
9 information. So they are action items, Jonathan.

10 MS. VALENTINE: That's one and three, but
11 he's talking about the second one, which I thought
12 there was a commitment to study it at the
13 appropriate time.

14 MS. GARZA: Unless, obviously, the facts
15 developed as such that it didn't make any sense to
16 study.

17 MS. VALENTINE: Okay. Okay.

18 MS. GARZA: Here is one thing I
19 think--let me just jump ahead a little bit, because
20 after this, I was going to discuss sort of the next
21 stage, and part of what we were going to discuss is
22 having working groups, as presently constituted or

1 changed, actually take the tentative list of issues
2 and basically work on it and focus on it and
3 formulate a working plan, if you will, and
4 information that would help us at a subsequent
5 meeting, say in March, is what I was going to
6 discuss with people so that we could try to
7 prioritize the issues as appropriate and have a
8 general understanding on kind of a work plan for
9 dealing with them.

10 Now, I think probably, just in looking at
11 this, the sentencing guidelines question, I don't
12 think it would be our intent to have a work plan or
13 anything at this point in time, but I think
14 everybody understands that it's not off the table,
15 it's going to be there, and we're going to continue
16 monitor developments over the course of time to
17 decide when and what want to do.

18 Is that fair?

19 MS. VALENTINE: That's fair.

20 MR. HEIMERT: So the final issue that's
21 being deferred for now is Mergers No. 8, which is
22 the harmonization of multi-jurisdictional merger

1 review, and, again, that is being deferred so that
2 we can gather further information about how we can
3 most be helpful to Congress and to the enforcement
4 agencies in that regard, and that will involve
5 further fact findings and discussions with those--

6 MR. YAROWSKY: And contact.

7 MR. HEIMERT: And contact with the
8 relevant committees. Exactly. So that will
9 involve further fact finding and then a
10 determination of how the Commission will proceed
11 after that has taken place.

12 MS. VALENTINE: And were we going to
13 limit that to procedure or are we going to leave
14 that to Congress's discretion in terms of what they
15 want?

16 MS. GARZA: I think the assumption is
17 that what we were talking about looking at was
18 procedural.

19 MS. VALENTINE: How the question was
20 originally phrased, okay.

21 MR. WARDEN: If it is procedural, it was
22 discussed in other contexts besides mergers.

1 MS. GARZA: Exactly.

2 MR. WARDEN: So it should be large.

3 MS. GARZA: It's a larger comity
4 convergence issue, and we want to, like I said, get
5 a little bit better understanding about what would
6 be helpful and what we could do in that area. The
7 ad hoc groups we're putting together would then
8 basically report back to the Commission for us to
9 make a decision.

10 MS. VALENTINE: Okay.

11 MS. GARZA: Makan? Okay. Unless there
12 are other questions on this--

13 MR. HEIMERT: I was going to finalize the
14 nos as well. You see the list of no issues. I
15 wanted to confirm with all Commissioners that none
16 of these should be in the yes column.

17 MS. GARZA: Why do some of them say--

18 MR. HEIMERT: Some of them say yes in the
19 recommended for study column because that was the
20 original recommendation .

21 MS. GARZA: I see. I see.

22 MR. HEIMERT: But the far left column is

1 the relevant one at this point. And the same,
2 Debra, on Mergers No. 7, the inclusion of Merger
3 No. 6 is with the same understanding that you
4 expressed earlier.

5 MS. VALENTINE: Okay.

6 MS. GARZA: That's a no?

7 MR. HEIMERT: Antidumping is a no. It's
8 the far left column, Jon. It was originally
9 recommended as a yes by the International Working
10 Group.

11 MS. VALENTINE: Okay. So it's 7(A)
12 included in six, okay.

13 MS. GARZA: Now, the other thing we
14 wanted to address, because it was brought up
15 earlier, was the first proposal in Assistant
16 Attorney General Hew Pate's letter which came to
17 us after the working group had already prepared
18 their memos and also didn't fit neatly into any
19 particular working group. I would like to propose
20 that before we vote on that one, we have the
21 opportunity to think a bit more about what it
22 entails, and so I'd like to propose that we have

1 an ad hoc task force of Commissioners to take
2 care of doing that and then reporting back to
3 the Commission with their recommendations.

4 Is this all right? Do I have any
5 volunteers? If you don't want to volunteer now, we
6 can deal with it.

7 MR. CARLTON: I'd volunteer.

8 MS. GARZA: You'd like to do that?

9 MR. CARLTON: I'd also like to just add
10 that I have a related issue I wanted to bring up,
11 and maybe we should defer that too to the same
12 group, which is the Assistant Attorney General's
13 letter--which I think is right on point in
14 suggesting these studies, not necessarily that we
15 do them, but that someone do them--there is a
16 related point, and that is we're going to be
17 issuing a report for the state of antitrust, but I
18 don't know if there is anything we've talked about
19 that will be prepared that will explain how many
20 merger cases have been brought. Maybe it's covered
21 in one of the merger topics, but how many cartel
22 cases, how many vertical cases, whether they're

1 brought by government agencies, private
2 individuals, how many private cases settle and of
3 each type. It seems to me that background
4 information would be consistent with what the
5 Assistant Attorney General is asking. So I would
6 just ask that whatever committee is formed also
7 think about that too.

8 MS. GARZA: All right. That sounds good.
9 Anyone who wants to join Dennis on that can just
10 get in contact with Andrew or myself and we'll get
11 that going.

12 Now, before we talk about the next step,
13 is there anything else that anyone wanted to raise
14 in terms of issues that haven't been considered or
15 anything else?

16 Okay. What I'd like to propose that we
17 do now is plan to--in order to keep the ball
18 rolling, plan to have working groups, and we'll
19 decide whether it makes sense to use the groups as
20 currently constituted or to re-jigger them based on
21 the work that we've done today, but to have those
22 groups now do the real hard work, which is to

1 figure out how is it is that they would recommend
2 to the Commission we go about attacking these
3 issues that we have identified for ourselves with
4 the idea being that to the extent they can suggest
5 to us any kind of sense of priority they think
6 should be attached to it, what we would like to do
7 is try to schedule--and Andrew will work with
8 Commissioners to try to do this --something in
9 March, toward the end of March, to have another
10 meeting like this, if it's possible, in which we
11 will consider written proposals from the working
12 groups in that regard, and that would be--what we
13 could come with at that meeting or shortly
14 thereafter should be the basis for the next number
15 of months going forward.

16 Yes, Jon.

17 MR. JACOBSON: How would you propose that
18 we deal with the issues that plainly overlap
19 working groups?

20 MS. GARZA: Well, I think what the staff
21 will do after today, will massage a bit, take the
22 issues that we've identified, do a kind of

1 organization, make sense of proposed, you know,
2 allocations to working groups. So I think it makes
3 best sense to have the staff take a look at this
4 and propose a workable way of tackling it for us,
5 which we'll deal with.

6 MS. VALENTINE: Do you have an ultimate
7 time frame in terms of when the final date is that
8 the report can be finalized, backing up from that
9 when you have to get it to the printers, how much
10 advance notice do you need on that?

11 MS. GARZA: We have been thinking about
12 nine months, didn't we? Nine months backing, at
13 least nine months. Having said that, it's
14 conceivable, I suppose, that some people may want
15 to issue something--we'll have to discuss this. It
16 may be that there are some issues that we want to
17 issue something before one final report. I know
18 that several Commissioners have suggested that.
19 We'll have to deal with it, but if you're thinking
20 about a single report, I think we were hoping to
21 lead nine months.

22 MR. DELRAHIM: Nine months from today?

1 MS. GARZA: No. Nine months from the
2 time that our Commission expires, which would be,
3 April-March of 2007. So where does that take us
4 then?

5 MR. HEIMERT: The summer of 2006. What
6 we had contemplated was a first, a solid full draft
7 of the report, in the summer of 2006 that the
8 Commission would then have the opportunity to
9 discuss further refinements to during the remainder
10 of the summer and the fall for finalizing in the
11 fall, and if there are other statements that
12 Commissioners would make with different views, that
13 those would be at the same time put into that at
14 that point.

15 MS. GARZA: You know, we have to talk
16 about this more, but you can imagine that the first
17 thing the Commissioners would want to see would be
18 largely a staff document which would basically
19 summarize the results of hearings and the fact
20 collection and everything else and in a sort of
21 non-judgmental way. It would simply say here is
22 what we have as a basis for the Commissioners then

1 to basically deliberate, and then the next part of
2 it would be to really kind of, I think, express the
3 views and recommendations of the Commissioners
4 based on the information.

5 So there is a first step, I think, which
6 is to understand what we learned from our efforts,
7 the second step being saying what do we then derive
8 from that, what do we think should be recommended,
9 and I think that would be a process that will
10 take some time and thoughtfulness, and there would
11 probably be a second part that will have to be
12 written.

13 MR. SHENEFIELD: Just as Andrew and I
14 discussed yesterday, there are three stages that
15 one of which you can begin immediately. There is
16 the sort of basic ground work stage. If you know,
17 for instance, that you're going to address Issue X,
18 you can begin to put in place a document that has
19 to do with the history of X and the legislation and
20 all that. Then there is sort of a second stage,
21 which is what is it that we're about to learn.
22 That couldn't be done yet, but it could be done

1 before the Commission debates. So with all the
2 excess staff time I know we have, you can sort of
3 begin that process, and I would also suggest that
4 there are organizations represented in the audience
5 that would be more than happy to be subcontracted
6 if you will. Whether that makes sense or not, I
7 don't know, but I think it's an option.

8 MS. GARZA: I think to some extent the
9 staff started that effort of background research
10 for the purposes of enabling us to deal with these
11 issues. So I think that we can assume that they
12 will continue to do that work.

13 MR. JACOBSON: Can we have the timetable
14 from now through April '07? We've gotten chunks of
15 it, but I'm really at the loss to figure who is
16 doing what.

17 MS. VALENTINE: Yeah. I'd like to see
18 that.

19 MS. GARZA: Right now, the staff is
20 currently--in fact Andrew, and I and he's been
21 talking to the staff have been essentially thinking
22 about of that. I think that's maybe why Andrew was

1 talking to John. They're doing a little more leg
2 work than they've done before. They're talking to
3 folks like John and actually the folks at ICPAC
4 and folks at the FTC who have done studies on
5 discrete issues, other commissions, like the 9-11
6 Commission, to get as much intelligence as he can
7 about what works and doesn't and to inform their
8 thinking so they can recommend to us a time line
9 that's going to make sense.

10 So right now, the staff is trying to
11 learn from the experiences of other people to
12 inform their recommendation to us on the
13 appropriate timing.

14 MR. JACOBSON: What is expected in the
15 working group memos that will be prepared in
16 advance of the March meeting?

17 MS. GARZA: We'll let you know. I mean,
18 we'll give guidance. Whether it was sufficient or
19 not, everybody got guidance on what these memos
20 should look like. So similar guidance will be
21 provided to the working groups as to what we think
22 is a reasonable expectation, again staff coming up

1 with ideas and talking to individual Commissioners
2 for what would be most helpful to assist further
3 deliberation in March to solidify work plans, etc.,
4 and I think the staff will be important to work on
5 that, because, you know, work plans are going to
6 tell them what they're going to be going out and
7 doing for the next period, and so they'll work
8 with, for now, the working groups as constituted
9 and talk to various Commissioners and come up with
10 a proposal for that.

11 MR. JACOBSON: That makes perfect sense.
12 The one part of your recitation that gave me a
13 little bit of pause was the concept of the staff
14 drafting anything, really, before the views of the
15 Commissioners had been heard.

16 MS. GARZA: Well, the first thing that
17 they would draft would be, frankly, for the
18 Commissioners and wouldn't--it would be the basis
19 for the Commissioners' views. In other words, I
20 assume that we will have hearings, testimony,
21 information collected, etc. So it will be--there
22 needs to be so some way to compile that and to

1 summarize it and to present it to the Commissioners
2 and to the public, much the way, for example, you
3 might--I don't know--the FTC staff might do for
4 hearings and stuff before the Commissioners and the
5 FTC would decide what they want to do.

6 So the first part of that, I think is the
7 necessary collection of what we've learned. It's
8 not biased. It's not recommending anything. But
9 it is the basis for which the Commissioners can
10 then deliberate and maybe their
11 recommendations. So it's, you know--

12 MR. YAROWSKY: My sense is that it's a
13 kind of factual predicate.

14 MS. GARZA: Right.

15 MR. YAROWSKY: It's a background. It's a
16 history, some relevant statutes or cases.

17 MS. GARZA: It's more than that. It's
18 more than that. If we hold hearings and get
19 information, it's that, but it's also, I think,
20 packaging, conveying, communicating in a way that's
21 manageable what we've learned, because I think as a
22 practical matter, we all have daytime jobs, and

1 while everybody has been really terrific about
2 rolling up their sleeves and doing a lot of hard
3 work, it's not going to be feasible, except for Jon
4 Jacobson, perhaps, for all of us to read everything
5 that comes in on all of these issues. It's not
6 going to be possible for me, I know, and so that's
7 where the work of our staff comes in, to assist us
8 in that.

9 MR. SHENEFIELD: One of the things,
10 though, that I thought the 9-11 Commission did
11 badly was to have staff studies reported out before
12 the Commission had its final debates and then
13 hearings in which the staff testified about what
14 their views were. And it created, I thought, a lot
15 of confusion.

16 MS. GARZA: Yes.

17 MR. SHENEFIELD: So I would suggest stay
18 away from that model entirely.

19 MS. GARZA: And I don't think that's what
20 I was suggesting.

21 MR. SHENEFIELD: No you weren't.

22 MS. GARZA: Okay.

1 MR. SHENEFIELD: I'm agreeing with you.

2 MS. GARZA: Okay.

3 MR. DELRAHIM: Deb, are we going to
4 be--now that we know the issues that the Commission
5 is going to be studying, will we be, for the
6 interest of the public, issuing a Federal Register
7 notice or immediately or soon as soon as possible
8 putting out a request both for public views on
9 these issues with a certain kind of time line or
10 deadline that we have those prior to the hearings
11 as well as requests for people who are willing to
12 testify? I think this is particularly important in
13 the immunities and exemptions areas because there
14 are so many industries and so many areas that
15 affected that we don't know to reach out to, but I
16 think for the purposes of transparency and
17 completeness, the sooner we do that, the more
18 complete record we'll have, the better we'll be
19 before the hearings.

20 MS. GARZA: Let me just say I think,
21 first of all, the first part of your question, I
22 think everything, of course, that we do as a

1 Commission is certainly posted to our web site.
2 Whether or not we do a Federal Register or not,
3 we'll have to defer the Andrew's recommendation on
4 that, but certainly one of the first things the
5 staff is going to do is, as I indicated, do
6 something that's more formal than this, basically
7 says and explains here is what we have tentatively
8 concluded, this is how we're going to proceed from
9 here and lay out the time line is similar to what
10 we were just talking about. That would be in the
11 public realm where they'll have that. That's a
12 short term. That's something that will be done
13 quickly.

14 The other thing, and we can discuss this,
15 I think rather than go out now with a Federal
16 Register notice, I was asking for people to comment
17 on our issues and volunteer to testify. I could be
18 wrong, but I've been thinking that the way to do it
19 is to--this is the idea of the work plans, and we
20 don't have to have an extended period of time to do
21 these work plans, and as soon as we can meet--if we
22 can meet in February, that's fine--but the idea

1 would be for the work plans to essentially be that,
2 for this issue, this is what we are going to do,
3 you know, however it is best to attack it, which
4 may very well include another notice requesting
5 comments, staffing to go out and do leg work to
6 identify people who we want to hear from and people
7 in particular, whatever it is. I'm not as
8 imaginative myself to come up with the best ways to
9 do it, but I would hope that that's what the staff
10 will then turn to and deal with the Commissioners
11 on to get their input and then propose back to the
12 Commission to just approve, if you will, as a plan
13 going forward. And at that meeting is when we
14 would also essentially vote and decide our time
15 line, our deadlines for getting certain things
16 done, and all of that.

17 So Andrew will have to work with you all
18 to figure out when. We're hard to get together on
19 one day. We've been very lucky doing it today. So
20 we don't want to wait too long. We want to keep
21 the ball rolling, and yet we want to give enough
22 time to get the work done. So whether it's the end

1 of February, beginning of March, whenever we can
2 get that done, that's what we would hope to do.

3 Is that comfortable?

4 MEMBERS IN UNISON: Yes.

5 MS. GARZA: Are there any other things
6 that we wanted to discuss before we send the staff
7 back to the office, lock the door, and make them
8 move us along?

9 MR. SHENEFIELD: I think it's probably
10 worth saying publicly what most of us have said to
11 the staff privately, that their role in putting
12 together this massive amount of work was
13 commendable, and they did it not just with
14 efficiency, but with a grace which I personally
15 appreciate and I'm sure we all do.

16 MS. GARZA: To use the word of the day,
17 ditto. That doesn't quite express it well enough,
18 but yes, we do appreciate the work, the strong work
19 the staff has given us and we look forward to
20 what's to come.

21 Thank you, Commissioners, the meeting is
22 concluded, adjourned. Thank you.

1 [Whereupon, at 4:40 p.m., the meeting was
2 adjourned.]

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